FEDERAL ENERGY REGULATORY COMMISSION'S ELECTRICITY REGULATION PROGRAM

Y 4.G 74/7:EN 2/29

Federal Energy Regulatory Commissio...

HEARING

BEFORE THE

ENVIRONMENT, ENERGY, AND NATURAL RESOURCES SUBCOMMITTEE

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

AUGUST 6, 1993

Printed for the use of the Committee on Government Operations

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APPENDIX

FEDERAL ENERGY REGULATORY COMMISSION'S ELECTRICITY REGULATION PROGRAM

FRIDAY, AUGUST 6, 1993

HOUSE OF REPRESENTATIVES,
ENVIRONMENT, ENERGY,
AND NATURAL RESOURCES SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2247, Rayburn House Office Building, Hon. Mike Synar (chairman of the subcommittee) presiding.

Present: Representatives Mike Synar, Carolyn B. Maloney, J. Dennis Hastert, John M. McHugh, Deborah Pryce, and John L. Mica.

Also present: Sandra Z. Harris, staff director; Ruth Fleischer, counsel; Elisabeth R. Campbell, clerk; and Charli E. Coon, minority professional staff, Committee on Government Operations.

OPENING STATEMENT OF CHAIRMAN SYNAR

Mr. SYNAR. The subcommittee will come to order.

Today the subcommittee turns its attention to FERC's fourth major regulatory area, electricity, in followup to our previous reviews of the Commission's gas, oil pipeline, and hydro programs. Not only is it our pleasure to examine a program which even its critics admit is generally working pretty well, but to do so in the company of FERC's new Chair, Betsy Moler, who seems to have, very frankly, no critics at all.

Despite an extensive study of FERC's procession of electric applications, the General Accounting Office found that the vast proportion of FERC's electricity business was completed relatively quickly, within a year, and in a majority of cases within a matter of months.

I realize that except for specialists, electricity regulation seems complicated and perhaps a little dry. But that need not be the case. In fact, in the last few years the electricity industry began a great upheaval, similar to the one that happened with airlines, telephone companies, and natural gas pipelines. Unlike the transformation of those industries, however, this brave new world of electricity regulation has gone largely unnoticed by the general public. What was previously an industry dominated by large regional monopolies has been slowly deregulating, piece by piece.

Dealing with this dramatic change is a tremendous challenge for regulators. As a result, the Federal-State regulatory relationship must also change to reflect the industry's increasing reliance on independently produced power, often wheeled to locations at long distances from where it was produced. And as markets become more competitive, regulators, too, must find new ways to insure protection of the public interest without crippling the market forces that should bring down electricity prices.

Creating this new regulatory scheme is a tall order for FERC. Doing it justice in an oversight hearing such as this is a tall order for this subcommittee.

I would ask unanimous consent that any opening statements by other members be made a part of the record.

The first panel is Mr. Victor Rezendes, Director of the Energy and Science Issues, Resources, Community, and Economic Development Division of the General Accounting Office. He is accompanied today by David Wood, Assistant Director, and Daniel Feehan, senior evaluator; also today we have the Honorable Ronald E. Russell, commissioner of the Michigan Public Service Commission on behalf of the National Association of Regulatory Utility Commissioners.

Before we swear in the witnesses, why don't we call on Mr. Hastert for his opening statement?

Mr. HASTERT. Thank you, Mr. Chairman.

I think that I speak for almost everyone present today when I say that the passage of the Energy Policy Act was one of the major accomplishments of the 102d Congress. We all worked diligently in seeking its enactment. We should be proud of our accomplishment.

During my tenure in the Illinois legislature, I led the effort which resulted in the adoption of the new Public Utilities Act in Illinois, reforming the law in my home State to benefit all Illinoisans. That act hadn't been changed since 1922. The Energy Policy Act of 1992 accomplished that same goal for the Nation. Now we face an equally challenging task. We must ensure that the EPACT is properly and expeditiously implemented. Today we will hear a GAO person tell us that FERC can improve the processing of its applications. This may well be true.

However, we must not allow either FERC or ourselves to become preoccupied with "administrative bean counting" and lose sight of the big picture. EPACT was passed to reform our electricity laws, to promote more competition in wholesale power markets, to encourage development of new technology, to ensure that fair and full third party access to transmission is made available, and that consumers benefit from a more competitive wholesale market.

Competitive forces are alive and well in the generation of electric power. Indeed, in a global marketplace, the price of electricity is a key component of the price of all goods and services. Thus it is essential that Congress maintain its oversight responsibility of FERC's electricity program. While we must avoid micromanaging FERC, we must nevertheless ensure that FERC implements not only the intent but also the spirit of EPACT.

Thank you, Mr. Chairman.

Mr. SYNAR. Gentlemen, as you are aware this subcommittee, in order not to prejudice past or future witnesses, swears in all our witnesses. Do any of you have any objection to being sworn?

If not, if you would stand and raise your right hand.

[Witnesses sworn.]

Mr. SYNAR. Welcome. Victor, let me first of all say that I apologize that we were unable to have the hearing last Friday when you were to testify, but if you had been here for the hearing on Monday you would probably have thanked me for that. Mr. Wells took a whipping in your behalf. I am just kidding. So we are glad to have you back here, and your entire testimony will be made a part of the record. We look forward to your summary at this time.

STATEMENT OF VICTOR S. REZENDES, DIRECTOR, ENERGY AND SCIENCE ISSUES, RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY DAVID WOOD, ASSISTANT DIRECTOR, AND DANIEL FEEHAN, SENIOR EVALUATOR

Mr. REZENDES. Thank you, Mr. Chairman.

I appreciate the opportunity to be here today to discuss the findings of our report on FERC's processing of electricity applications. As you know, utilities must apply to FERC for approval for proposed wholesale electricity transmission and certain other transactions.

My testimony will cover three basic issues. One, factors affecting the time that FERC takes to process electric applications; two, the Energy Policy Act's implications on FERC's workload; and three, procedural changes that can reduce processing time. First, the processing time for electric applications depends primarily on the application's characteristics, which determines the procedures that FERC follows.

If you will refer to the flow chart on appendix I of our prepared statement, you will see there are four basic paths which an application might follow. That is appendix I of the full statement.

FERC receives a variety of applications, most having to do with a rates change for the sale or transmission of electric power. The majority of routine applications do not raise factual, legal, policy or other issues that are either contested by FERC or other affected parties. These applications are decided by the Director of FERC's Office of Electric Power Regulation [OEPR].

In contrast, nonroutine applications require review and decision by five FERC Commissioners. Depending on the issues raised and whether or not applications are contested, the Commissioners may go ahead and decide the case or schedule it for a trial-type hearing before an administrative law judge. Many cases are settled voluntarily.

If we refer to the bar chart that we have prepared, which is the first chart on my left here, and it is also included as appendix III of my full statement, you can see that these four courses of action really drive the amount of time required. We looked at about 4,475 applications that FERC decided from 1990 through 1992.

About 80 percent of these were routine and were completed within an average of about 2 months from receipt. The commission decided most of the remaining routine applications without a trial-type hearing on an average of just under 6 months, so of all of the applications decided, including the routine ones, 96 percent were completed in less than 6 months.

It was the relatively few, about 4 percent, requiring a trial-type hearing, that took the longest. These applications were the ones that raised the legal, economic, and policy issues that are contested by third parties and most are rate cases. While about half of these were settled voluntarily in just over 1 year, the remaining applications required a trial-type hearing and took almost 3 years to complete.

The next issue relates to the Energy Policy Act's impact on FERC's workload. The act, in conjunction with industry changes already underway, are likely to increase the applications requesting FERC orders for transmission services and applications for wholesale power transactions, especially those proposing rates based on market forces.

Requests for transmission orders could be added to FERC's workload by requiring FERC to undertake complex analysis of transmission systems and the effects of various transmission options, information that it previously had not been required to routinely analyze. Requests for market rates require a different analysis from traditional cost base rates, but could decrease overall processing time as applications cover a smaller range of potentially contestable issues.

The effect of transmission applications on FERC's workload is difficult to determine. It depends in part on the volume and complexity of the applications and whether parties reach voluntary agreements before submitting their applications for processing. The prospect of an increased workload highlights the need to assure that applications are processed expeditiously.

Our work identified several opportunities for potentially reducing average processing time. First, changes in FERC's automatic information system would allow FERC to identify bottlenecks in the review process and reduce the time needed to decide applications. We recommended similar changes in an earlier report on gas pipeline processing which FERC has adopted.

Second, systematically analyzing issues arising and information exchanged between applicants and FERC staff could help reduce the incidence of incomplete applications. FERC staff estimated that up to 30 percent of the applications are incomplete when received. This is almost the exact same percentage of incomplete applications we found in our review of FERC over a decade ago.

Finally, FERC could reduce the number and/or duration of lengthy trial-type hearings by adopting alternative methods of resolving contested applications, such as the Administrative Dispute Resolution Act. FERC has yet to adopt the policy as required under the act and is intended to promote alternatives to lengthy trial-type hearings.

With that, Mr. Chairman, I will stop and be happy to answer any questions.

[The prepared statement of Mr. Rezendes follows:]

United States General Accounting Office

GAO

Testimony

Before the Environment, Energy, and Natural Resources Subcommittee, Committee on Government Operations, House of Representatives

For Release on Delivery
Expected at
9:30 a.m. EDT
Friday
August 6, 1993

ELECTRICITY REGULATION

Factors Affecting the Processing of Electric Power Applications

Statement of Victor S. Rezendes,
Director, Energy and Science Issues,
Resources, Community, and Economic
Development Division

GAO/T-RCED-93-65

Mr. Chairman and Members of the Subcommittee:

We appreciate the opportunity to appear before you today to discuss the findings of our report on the Federal Energy Regulatory Commission's (FERC) processing of applications for approval of proposed wholesale electricity transactions.[1] In that report, we reviewed (1) factors affecting the time that FERC takes to process electric power applications; (2) ways the Energy Policy Act of 1992 might affect FERC's work load, particularly the Commission's new authorities and responsibilities concerning electricity transmission; and (3) potential procedural changes that could reduce application processing time.

In summary, we found the following:

-- The processing times for electric power applications depend primarily on the applications' characteristics--particularly whether or not the applications raise factual, legal, or policy issues or are contested by wholesale customers, third parties, or FERC staff. These factors largely determine the procedures FERC follows. We analyzed the 4,475 applications FERC decided on during fiscal years 1990-92. About 80 percent were "routine"; that is, they did not raise factual, legal, or policy issues and were not contested. FERC staff decided on

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[1]Electricity Regulation: Factors Affecting the Processing of Electric Power Applications (GAO/RCED-93-168, July 23, 1993).

these applications within an average of 68 days. The remaining applications required the attention of the commissioners. While the average time to process these applications was 275 days, many took years to complete.

-- The Energy Policy Act of 1992 is likely to increase the number of wholesale electricity sellers and transactions requiring FERC's approval. Most importantly, the act expanded FERC's authority to order utility companies to provide electricity transmission services. As a result, FERC is likely to begin receiving more applications for such orders. Because its authority to issue such orders prior to the act was limited, FERC has little experience in this area. The effect of transmission applications on FERC's work load is difficult to determine. It depends in part on the volume and complexity of the applications and the extent to which potential buyers and sellers reach voluntary agreements before submitting the applications to FERC.

-- Cost-effective approaches exist that could reduce the time FERC takes to decide on applications. Accordingly, our report recommended that the Chair of FERC (1) revise the method for tracking applications in FERC's management information system to identify potential bottlenecks, (2) improve the accuracy of applications received by

analyzing the number of and reasons for incomplete applications, and (3) increase the use of voluntary settlement procedures when possible by adopting a policy--as required by a 1990 law--designed to encourage alternatives to lengthy trial-type hearings.

BACKGROUND

Under the Federal Power Act, FERC is responsible for ensuring that the rates, terms, and conditions of wholesale electricity transactions are "just and reasonable" and nondiscriminatory. In addition, owners and operators of facilities used in the sale and transmission of wholesale electricity are required to obtain FERC's approval before selling, merging, consolidating, or otherwise disposing of those facilities. Utilities and other sellers of wholesale power that wish to carry out these transactions must submit an application to FERC. Under the Federal Power Act and the Administrative Procedure Act, FERC must follow certain procedural rules in deciding on proposed electric power transactions. These procedures include filing a public notice of the transactions and allowing affected parties--such as utility customers, state utility commission officials, or others--to comment.

Historically, FERC approved proposed transactions largely after ensuring that rates properly reflected the seller's costs,

including a predetermined limit on the rate of return; such rates are called cost-based rates. In the 1980s, FERC began approving certain wholesale transactions if it found that they were the result of an operating free market; such rates are called market-based rates. Market-based rates require less regulatory oversight and provide sellers with an opportunity to earn a greater rate of return than they can under cost-based regulation.

TIME IT TAKES TO PROCESS APPLICATIONS DEPENDS ON APPLICATIONS' CHARACTERISTICS

FERC receives a variety of electric power applications. The largest number are rate-change applications--proposals to establish (or modify existing) agreements for the sale and/or transmission of wholesale electric power. About nine other types of applications do not directly involve rates, terms, or conditions, but serve other regulatory or procedural purposes.

As shown graphically in the flowchart in appendix I, routine applications are decided on by the Director of FERC's Office of Electric Power Regulation (OEPR) under authority delegated by the commissioners. In contrast, nonroutine applications must be decided on by the commissioners. Depending on the application's characteristics, the commissioners may either use a trial-type evidentiary hearing before one of FERC's administrative law

judges (ALJ), or decide on the application directly without a trial-type hearing.

Nonroutine applications that raise legal or policy issues--rather than questions of fact--are typically decided on directly by the commissioners without the use of a trial-type hearing. For example, FERC has processed roughly 50 market-based rate applications since 1984. While such applications represented a change in the Commission's policy, the facts in these cases were not contested and thus a trial-type hearing was unnecessary. During fiscal years 1990-92, the commissioners decided on 747 applications without a trial-type hearing in an average time of 169 days.

The commissioners typically use a trial-type hearing for those applications in which affected parties and/or FERC staff contest the factual information contained in the application. Contested applications frequently involve factual disputes about wholesale (cost-based) rate increases, in which the basis for the increase (the seller's costs) are disputed by customers or FERC staff. During fiscal years 1990-92, FERC decided on 172 applications that had been previously scheduled for a trial-type hearing. Half were settled voluntarily (before the ALJ issued a decision) in an average of 1.2 years; the other half proceeded through the entire hearing process and took, on average, 2.8 years to decide. As shown in the table in appendix II, all

application types included nonroutine applications and these applications required, on average, roughly four times longer to decide than routine applications.

STATUTORY CHANGES COULD INCREASE FERC'S WORK LOAD

The Energy Policy Act of 1992 amended two key statutes that regulate electric utilities: the Federal Power Act and the Public Utility Holding Company Act of 1935 (PUHCA). These amendments, in conjunction with industry changes already under way, are likely to increase (1) applications requesting FERC orders for transmission services and (2) applications for wholesale power transactions, especially those proposing market-based rates. However, the magnitude of these increases and the change, if any, in the level of resources FERC will need to respond are uncertain.

FERC Faces New Role in Electricity Transmission

In 1978, FERC was authorized to mandate the provision of transmission services. However, partly because such orders had to satisfy a number of rigorous criteria, FERC has virtually never used this authority. The 1992 act (1) expanded FERC's authority to issue mandatory orders by reducing the number of

criteria that must be satisfied and (2) required FERC to acquire and make publicly available information about utilities' transmission capacity and known constraints.

The effects of these amendments on FERC's overall work load are difficult to estimate and could be contradictory. For example, those seeking transmission services may be more likely to request a mandatory order simply because FERC has expanded authority to issue such orders. However, when information about available transmission capacity is made public, those seeking transmission services may be in a better position to negotiate voluntary arrangements with transmission owners, thus precluding the need for a mandatory FERC order. Also, because of FERC's lack of experience in issuing such orders, owners of transmission facilities may be more willing to enter into voluntary arrangements to avoid uncertainty or a FERC order with unfavorable rates, terms, or conditions.

Requests for mandatory orders or approval of voluntary agreements could add to FERC's work load by requiring FERC to undertake complex analyses of transmission systems and the effects of various transmission options--information that it previously has not been required to routinely analyze. FERC officials responsible for electricity regulation stated that they have limited experience in these kinds of analyses and that the effect on FERC's work load of applications requesting mandatory

orders is difficult to determine. Specific effects depend on how many transmission applications FERC receives; whether they are contested or raise factual, legal, or policy issues that the Commission must decide; and whether parties can reach voluntary settlements before submitting applications to FERC.

Potential Exists for More Wholesale Transactions

Partly in response to economic and regulatory changes, wholesale electricity markets have grown significantly in recent years. Electricity sold in wholesale transactions now accounts for more than half of the electricity sold to retail customers. As we reported in 1992, amendments to PUHCA are likely to further increase the number of wholesale suppliers in electricity markets and the proportion of electricity generated for wholesale consumption.[2]

The increase in the number of wholesale suppliers and expanded access to transmission facilities may create or augment wholesale electricity markets. Because of the opportunity to earn greater returns, wholesale suppliers may be more likely to propose market-based, rather than cost-based, rates. The analysis of market-based rates--which includes a review of the

[2]Electricity Supply: Potential Effects of Amending the Public Utility Holding Company Act (GAO/RCED-92-52, Jan. 7, 1992).

seller's and buyer's relative influence in determining the "market" price--differs significantly from traditional cost-based rate applications, which require FERC to review utility cost information. According to FERC officials, substantially fewer issues can be contested in market-based rate applications than in cost-based rate applications. As a result, market-based rate applications are less likely than cost-based rate applications to require a trial-type hearing.

ACTIONS COULD REDUCE AVERAGE PROCESSING TIME

FERC officials agreed that cost-effective approaches exist to further reduce the time it takes to process electric power applications.

First, changes to FERC's automated information system would improve its usefulness as a management tool. We reported in February 1992 that FERC's management information system--the Key Indicator Case Tracking System (KICTS)--did not enable FERC to effectively evaluate its application review process for natural gas pipelines.[3] Specifically, KICTS did not retain the original target dates for key phases in the review process. Retaining these dates would have allowed FERC to assess its performance in

[3]Natural Gas: Factors Affecting Approval Times for Construction of Natural Gas Pipelines (GAO/RCED-92-100, Feb. 26, 1992).

meeting target dates and identify areas needing improvement. FERC officials agreed with our assessment and altered KICTS to retain these dates for gas pipeline cases.

Similarly, KICTS files used to assess electric power applications could benefit from upgrades to capture certain dates. Under its current design, KICTS does not consistently retain beginning and end dates as applications move through the various stages of FERC's review process. Such information would allow FERC to assess its performance in processing applications and identify bottlenecks in the review process. KICTS also does not capture the number of incomplete applications FERC receives or the time it takes applicants who file incomplete applications to provide missing information. Improving KICTS to capture this information would allow FERC to use KICTS as a management tool for identifying the volume of incomplete applications and the additional time spent processing them--first steps in reducing the incidence of incomplete applications.

Second, systematically analyzing issues arising and information exchanged between applicants and FERC staff could help reduce the incidence of incomplete applications. FERC staff responsible for processing electric power applications estimated that 30 percent of all rate-change applications fail to satisfy FERC's application filing requirements. To minimize processing time, FERC staff often telephone applicants if information is

missing from an uncontested application. FERC staff estimate that they place roughly 250 calls annually. For contested applications, the staff issue formal letters requesting the needed information. These letters are infrequent, averaging about 40 per year during fiscal years 1990-92. Applicants also have the option of telephoning FERC staff to discuss filing requirements before submitting an application. FERC staff estimate that they receive about 200 such calls annually. However, issues raised and information communicated in telephone calls and letters are not analyzed.

Finally, FERC could reduce the number and/or duration of lengthy trial-type hearings by adopting alternative methods of resolving contested applications. As illustrated in the bar graph in appendix III of this statement, our analysis of applications completed during fiscal years 1990-92 clearly indicates that those requiring trial-type hearings take significantly more time and that processing time can be reduced if the parties settle voluntarily. FERC has had some success in encouraging parties to reach voluntary settlements: Half of the applications scheduled for a trial-type hearing that were decided on during fiscal years 1990-92 were settled voluntarily.

The Administrative Dispute Resolution Act, enacted in November 1990, authorized federal agencies, until October 1, 1995, to use measures other than trial-type hearings, including

arbitration and mediation, to resolve cases. The act requires almost all government authorities, including FERC, to adopt a policy addressing the use of alternative settlement procedures but does not specify a mandatory deadline. As of August 2, 1993, FERC had not yet adopted such a policy under the act.

CONCLUSIONS AND RECOMMENDATIONS

Our work has shown that FERC has opportunities to decrease the time it takes to process electric power applications. These opportunities are especially important considering the potential that FERC's work load will increase as a result of the Energy Policy Act.

Accordingly, our report recommends that FERC's Chair

-- upgrade FERC's management information system to retain (1) data reflecting start and completion dates of when applications' moved through the various stages of the application review process and (2) data indicating the number of incomplete applications and the length of time needed for applicants to supply missing information;

-- systematically gather data on incomplete applications, through deficiency letters and telephone calls regarding filing requirements, and periodically assess this

information to determine if revisions to FERC's filing requirements, policy statements, or other strategies could be used to eliminate or reduce the number of recurring problems; and

-- expedite the adoption of a policy, as required by the Administrative Dispute Resolution Act, allowing for the use of additional alternative settlement procedures.

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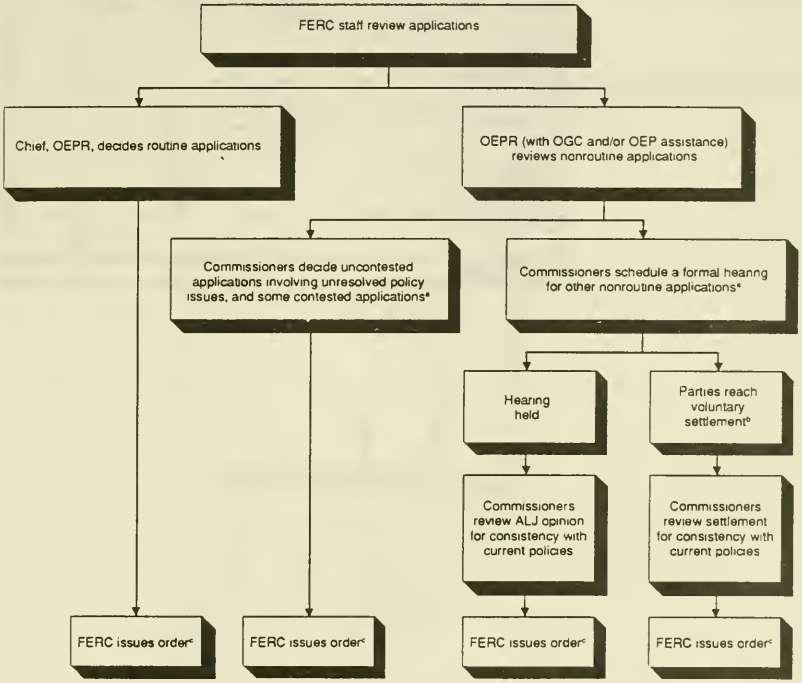
This concludes our prepared statement. We will be glad to answer any questions that you or other Members of the Subcommittee may have.

Overview of FERC Application Review Process



[a]At this point, the commissioners may reject part or all of an application

[b]Although most settlements occur at this stage, settlements can occur before a hearing is scheduled or after a hearing

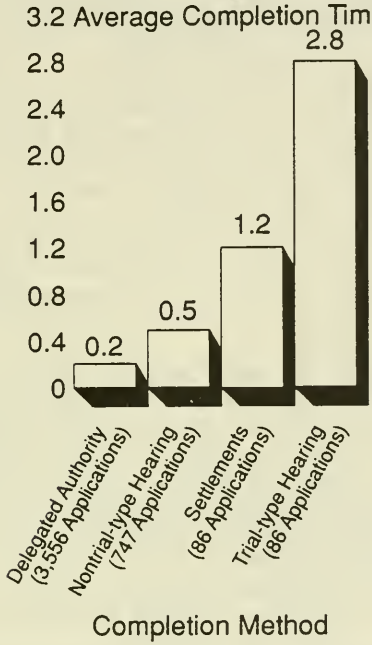
[c]Although an application has been decided at this point, a request for rehearing necessitates additional Commission action, which concludes by the Commission issuing an order on rehearing.

APPENDIX II

Processing Times for Routine and Nonroutine Applications Decided During Fiscal Years 1990-92

	Routine application		Nonroutine application	
Application type	Number completed	Average (days)	Number completed	Average (days)
Rate changes	1,771	77	313	403
Complaints			75	396
Rehearing requests	1	32	376	152
Qualifying facilities	1,039	32	32	148
Compliance actions	244	99	34	190
Corporate actions	41	90	18	190
Interlocking positions	428	93	7	509
Federal rate review	30	154	11	602
Declaratory orders	2	229	37	294
Court remands			16	154
Total	**3,556**		**919**	
Weighted average		68		275

GAO Applications Processed FY 1990-92



Note: The total number of applications completed was 4,475.

Source: GAO analysis of FERC data

(307331)

Mr. SYNAR. Thank you very much.
Mr. Russell, welcome to the subcommittee.

STATEMENT OF RONALD E. RUSSELL, COMMISSIONER, MICHIGAN PUBLIC SERVICE COMMISSION, ON BEHALF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Mr. RUSSELL. Mr. Chairman, members, thank you.

Good morning. I am Commissioner Ron Russell with the Michigan Public Service Commission. I also chair the committee on electricity of the National Association of Regulatory Utility Commissioners on whose behalf I am testifying here today.

The NARUC greatly appreciates the opportunity to testify before your subcommittee on topics related to Federal and State regulation of the electric utility industry, both before and after passage of the Energy Policy Act. I know the major focus of this hearing is on the General Accounting Office's report on the Federal Energy Regulatory Commission's electricity program.

The NARUC believes it is critical that the FERC is given the resources necessary to carry out its responsibilities under EPACT. At the outset I want to say that I am extremely encouraged by the Clinton administration's willingness to strike a new positive relationship with State commissioners.

My enthusiasm for beginning this relationship was considerably bolstered by what I heard and saw from Energy Secretary O'Leary, Assistant Secretary Tierney and FERC Commissioners Bailey and Massey at our summer committee meetings held last week in San Francisco. On behalf of the NARUC, I want to pledge that we will make every effort to see that our relationship is built upon cooperation, consultation, and a willingness to find solutions to the tough jurisdictional policy questions that face us.

If we can do this, I believe that consumers, the electric industry, State and Federal regulators and, yes, even the Congress will sleep easier at night.

The NARUC stated its position early and clearly in the debate over PUHCA reform, calling upon the Congress to address four major regulatory issues as part of PUHCA reform. These issues are listed in the attached resolution adopted by NARUC in 1989.

I will briefly describe two of these issues, and in doing so, hope to address at least the first and second questions you have posed concerning problems created by the split in Federal-State jurisdiction over electricity regulation prior to passage of the Energy Act.

The NARUC's first priority in the PUHCA debate was obtaining clear legislative assurance that State commissions would not be preempted when they review the lawfulness of wholesale power purchases by retail electric utilities. That assurance would have been given in the form of codifying the so-called Pike County doctrine which holds that State commissions have the right to review the reasonableness of the buy-side of wholesale transactions involving the retail electric utilities they regulate.

As you know, there is no codification of the Pike County doctrine in title 7 of EPACT. This leaves open the question of whether State commissions can exercise their Pike County authority without the threat of preemption. Although the Pike County doctrine has sur-

vived court challenges in the past, more challenges may occur in the future. This is not settled law.

The absence or presence of Pike County in EPACT would have little effect on State commissions who are responsible for regulating the transactions of multi-State registered utility holding companies. States with such responsibility have been effectively preempted from reviewing wholesale transactions by the Mississippi Power and Light decision. Under the Supreme Court's decision in MP&L, such companies may be able to purchase power from affiliated and unaffiliated sources with no State regulation of their purchasing decisions. Moreover, no review of the decision whether to purchase power could be obviated or mitigated.

The NARUC sought to fill this very real regulatory gap in its 1989 resolution by proposing that Congress authorize regional compacts for those States with jurisdiction over retail subsidiaries of holding company systems. These regional compacts would be formed voluntarily by States, and if they so choose, they could regulate not only the prudence of wholesale purchases but could also allocate the costs of the purchases among the retail distribution subsidiaries.

The NARUC continues to support the principle of legislation authorizing regional regulatory compacts. Combining the innovative concepts of integrated resource planning or IRP with the evolution of regionalized generation markets makes even more sense in the post-EPACT world.

State utility commissions from different jurisdictions must have the regulatory tools to evaluate all the options available to the electric companies they regulate. Senator Johnston and Bumpers' bill, Senate bill 2607, represented a starting point for forming a consensus on how to not only deal with Federal versus State regulatory issues but State versus State regulatory issues.

Nonpower transactions among affiliates of registered holding company systems is another troubling area for State commissions. This issue not only involves the FERC and States, but the Securities and Exchange Commission, also. Senator Bumpers has introduced legislation to correct problems in SEC's enforcement of PUHCA's consumer protection provisions by clarifying the role of the SEC, FERC, and the States.

The NARUC has endorsed those portions of S. 544 that pertain to the Ohio Power case in which FERC, and implicitly states, was preempted from reviewing the reasonableness of nonpower transactions of registered company affiliates.

We are greatly encouraged by our recent dealings with the SEC. The SEC staff have recently offered to begin a serious dialog on issues of concern to us. We are hopeful that the new SEC chairman will pursue this dialog shortly.

It has long been the NARUC's policy that Congress, the FERC, and the States should work together to develop voluntary regional approaches to utility planning and regulation wherever it makes sense to do so. As a result, we believe that regional transmission groups may be a useful mechanism for coordinating the operation of transmission systems on a regional basis.

Indeed, as we note in the comments we recently submitted in FERC's regional transmission group [RTG] proceeding in March

1991, the NARUC executive committee adopted a resolution calling for legislation to authorize regional regulation of regional transmission issues. Later that year, at its summer meeting in July 1991, the executive committee once again endorsed voluntary regional approaches to the regulation of regional transmission issues, as part of a broader policy issue reflected in the then-pending legislation that later became the Energy Policy Act.

We have long supported broad reform of electric utility jurisdiction to ensure necessary protection for consumers by conforming regulatory oversight to address the changing operations of this industry, particularly with respect to the acquisition of bulk power at wholesale and interaffiliate transactions. However, we have expressed opposition to the FERC's adoption of a rigid set of rules that could be used to enable the members of "certified" RTG's to avoid or frustrate State regulatory policies.

Although we still review the FERC's July 30 RTG policy statement, it appears that the Commission's approach is generally consistent with the way that we think that RTG policy should evolve. By adopting a policy statement rather than a rule, the Commission will allow RTG policy to evolve in a flexible, regional specific way.

More importantly, from NARUC's perspective, the FERC statement clearly states that RTG members will be expected to "provide a means of adequate consultation and coordination with relevant State regulatory . . . authorities." It is our hope that parties interested in forming RTG's will see this statement as the FERC's clear signal that formation of RTG does not relieve them of their obligation to comply with all applicable State and local planning, ratemaking, and environmental requirements.

Beyond the question of State-Federal coordination, it is our preliminary view that the Commission's RTG policy statement is the sensible approach to begin sorting out the issues of RTG membership, geographic scope, regional planning, and governance/dispute resolutions.

The NARUC strongly supports the use of FERC/State joint boards and joint hearings to coordinate State and Federal regulation of the electric industry. Accordingly, in recent years the NARUC has consistently advocated amendments to the Federal Power and Natural Gas Act to establish joint board procedures that would provide a useful means to reach joint decisions on broad policy issues of concern to both State regulators and the commission. In a nutshell, the problem with section 209 procedures is that they require the FERC to include a representative from every State commission in any board which is looking at generic issues.

By contrast, the NARUC proposal would establish a more efficient procedure in which representatives of a broader State regulatory community would be nominated by our association to sit with FERC Commissioners to discuss issues of mutual concern and develop recommended policies for the Commission's consideration.

Mr. SYNAR. Mr. Russell, if you could begin to conclude at this point.

Mr. RUSSELL. Thank you. There are other procedures such as joint hearings and informal conferences and workshops which should also be pursued.

Let me take a minute and end right there, but before I do that, let me also change my hat to a Michigan hat and offer to the committee a procedure that Michigan currently uses that could possibly deal with some of the concerns that are raised in the GAO report about increased time needs of the FERC to operate and also backlogs and cases.

In Michigan, we have an exemption to the Open Meetings Act. We have had it since 1988. We have got it for 6 years, and I would be willing to provide the committee any information along that line because there are some substantial policy issues that surface from that exemption, and I think that the result of Michigan's ability to move its docket would be applicable to the committee's inquiry.

Thank you.

[The prepared statement of Mr. Russell follows:]

BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENT OPERATIONS
SUBCOMMITTEE ON ENVIRONMENT, ENERGY AND NATURAL RESOURCES

WRITTEN TESTIMONY OF
THE HONORABLE RONALD E. RUSSELL, COMMISSIONER
MICHIGAN PUBLIC SERVICE COMMISSION

ON BEHALF OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
1102 INTERSTATE COMMERCE COMMISSION BUILDING
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OVERSIGHT HEARING ON OPERATIONS AND PROCEDURES OF THE
FEDERAL ENERGY REGULATORY COMMISSION AND
ITS ELECTRICITY PROGRAM

AUGUST 6, 1993

Chairman Synar and Members of the Subcommittee:

INTRODUCTION

Good Morning. I am Commissioner Ron Russell with the Michigan Public Service Commission. I also chair the Committee on Electricity of the National Association of Regulatory Utility Commissioners (NARUC), on whose behalf I am testifying here today.

The NARUC is a quasi-governmental, nonprofit organization whose members include regulatory bodies of the fifty States, the District of Columbia, Puerto Rico and the Virgin Islands. Designed to serve the public interest by seeking to improve the quality and effectiveness of government regulation of carriers and utilities, its members play a crucial role in shaping the profile and substance of public regulation in America today.

The NARUC greatly appreciates the opportunity to testify before your Subcommittee on topics related to Federal and State regulation of the electric utility industry, both before and after passage of the Energy Policy Act (EPACT). I know the major focus of this hearing is the General Accounting Office's report on the Federal Energy Regulatory Commission's program of processing wholesale power transactions. The NARUC believes it is critical that FERC is given the resources necessary to carry out its responsibilities under EPACT. In my testimony today, I plan to offer suggestions on how FERC and the States can work in concert in implementing the many provisions of Title VII of EPACT. I hope these suggestions will help FERC work toward the goal of avoiding delay and endless litigation over its implementation policies.

Before addressing the questions you posed in your letter inviting NARUC to testify at this hearing, I want to say that I am extremely encouraged by the Clinton Administration's willingness to strike a new, positive relationship with State commissioners. My enthusiasm for beginning this relationship was considerably bolstered by what I heard and saw from Energy Secretary O'Leary, Assistant Secretary Tierney and FERC Commissioners Bailey and Massey at our Summer Committee Meetings in San Francisco. On behalf of the NARUC, I want to pledge that we will make every effort to see that our relationship is built upon cooperation, consultation and a willingness to find solutions to the tough jurisdictional policy questions that face us. If we can do this, I believe that consumers, the electric industry, State and Federal regulators and yes, even the Congress, will be able to sleep easier at night.

ISSUES LEFT UNRESOLVED

As you are aware, the NARUC was deeply involved in the congressional debate that led to the enactment of the amendments to the Public Utility Holding Company Act of 1935 which are contained in Title VII of EPACT. The NARUC stated its position early and clearly in the debate, calling upon the Congress to address four

major regulatory issues as part of PUHCA reform. These issues are listed in the attached resolution adopted by NARUC in 1989. (This and other relevant NARUC Resolutions can be found in Appendix A.) I will briefly describe two of these issues, and in doing so, hope to address at least the first and second questions you have posed concerning problems created by the split in Federal-State jurisdiction over electricity regulation prior to passage of the Energy Act.

First and foremost during the debate over the Energy Policy Act, the NARUC sought clear legislative assurance that State commissions would not be pre-empted when they review the lawfulness of wholesale power purchases by retail electric utilities. That assurance would have been given in the form of codifying the so-called Pike County doctrine, which holds that State commissions have the right to review the reasonableness of the buy-side of wholesale transactions involving the retail electric utilities they regulate. As we maintained throughout the debate, codification of Pike County is not only a State versus Federal jurisdictional issue, it is at the very heart of what State utility regulators are charged with doing, which is making sure captive customers of electric utilities pay just and reasonable rates.

As you know, there is no codification of the Pike County doctrine in Title VII of EPACT. This leaves open the question of whether State commissions can exercise their Pike County authority without the threat of pre-emption. Although the Pike County doctrine has survived court challenges in the past, more challenges may occur in the future. We do, however, take some comfort in the language appearing in the Energy Act's conference report. This language states unequivocally that Congress did not intend the provisions of Title VII to pre-empt States' use of their Pike County authority.

Although having Pike County codification as part of the electricity title of EPACT would have greatly helped clarify the regulatory structure of the electric utility industry as well as provide basic consumer protections, its absence or presence would have little effect on State commissions who are responsible for regulating the transactions of multi-state registered utility holding companies. States with such responsibility have been effectively pre-empted from reviewing wholesale transactions by the Mississippi Power & Light decision. Under the Supreme Court's decision in MP&L, such companies may be able to purchase power from affiliated and unaffiliated sources with no State regulation of their purchasing decisions. Moreover, no review of the decision whether to purchase power could be obviated or mitigated.

To avoid State regulation, a holding company could simply purchase power from third parties through an affiliate which is not subject to the regulatory authority of the State commissions in whose jurisdictions it operates retail subsidiaries. Under the

logic of MP&L, the States would be required to pass through the costs of purchased power once it had been allocated to the operating subsidiaries by an FERC allocation order.

The NARUC sought to fill this very real "regulatory gap" in its 1989 resolution by proposing that Congress authorize regional compacts for those States with jurisdiction over retail subsidiaries of holding company systems. The NARUC later "fleshed out" this proposal in a resolution adopted in 1991, which called for amending the Federal Power Act to authorize States with regional holding companies to voluntarily form regional regulatory bodies to review the prudence of any wholesale purchases the company may make for its system supply, i.e. to meet the collective need for power of its subsidiaries rather than an individual operating subsidiary's needs. These bodies would be formed voluntarily by the States, and if they so chose, they could regulate not only the prudence of wholesale purchases but could also allocate the costs of the purchases among the retail distribution subsidiaries. We proposed that no regional body could be established unless all of the States agreed.

Elements from this proposal were incorporated into S. 2607, introduced during the last session of Congress by Senators Johnston, Bumpers, Breaux and Pryor. Negotiations to include the provisions of S. 2607 into the PUHCA Reform title of the Energy Act continued during the conference committee action on the bill but broke off when the principal parties involved could not agree on an consensus package. Thus, the "regulatory gap" issue pertaining to registered company systems joins the lack of clear State authority regarding review of wholesale transactions by retail electric utilities as two of the important "regulatory issues" Congress failed to address when it decided to unleash more competition in the electric utility industry through PUHCA reform.

The NARUC continues to support the principles of S. 2607, which are built upon a regional approach to integrated resource planning. Combining the innovative concepts of IRP with the evolution to regionalized generation markets makes even more sense in the post-EPACT world. State utility commissions from different jurisdictions must have the regulatory tools to evaluate all the options available to the electric companies they regulate. S. 2607, although not perfect, represented a starting point for forming a consensus on how to not only deal with Federal versus State regulatory issues but State versus State regulatory issues.

CLARIFICATION OF REGULATORY ROLES

While S. 2607 would have provided a remedy to the problems created by the Mississippi Power & Light decision, it would have left untouched the area of non-power transactions among affiliates of registered holding companies. This issue not only involves the FERC and States, but the Securities and Exchange Commission also.

Senator Bumpers has introduced legislation to correct the defects of the SEC's enforcement of PUHCA's consumer protection provisions by clarifying the role of the SEC, FERC and States. The NARUC has endorsed those portions of S. 544 that pertain to the Ohio Power case, in which FERC (and implicitly States) was pre-empted from reviewing the reasonableness of non-power transactions of registered company affiliates. If Congress does not overturn the Ohio Power decision, we fear States will have no effective oversight of the contracts a utility subsidiary signs with a power supply or non-power supply affiliate initially, or the utility's implementation of a contract on an ongoing basis. The NARUC takes no position on the other aspects of S. 544, which would transfer all PUHCA jurisdiction currently held by the SEC to the FERC.

We are greatly encouraged by our recent dealings with the SEC. The SEC staff have recently offered to begin a serious dialogue on issues of concern to us. We are hopeful that the new SEC Chairman will pursue this dialogue shortly.

REGIONAL TRANSMISSION GROUPS

It has long been the NARUC's policy that Congress, the FERC, and the States should work together to develop voluntary regional approaches to utility planning and regulation wherever it makes sense to do so. As a result, we believe that Regional Transmission Groups (RTGs) may be a useful mechanism for coordinating the operation of transmission systems on a regional basis. Indeed, as we noted in the comments we recently submitted in FERC's RTG proceeding, in March 1991, the NARUC Executive Committee adopted a resolution calling for legislation to authorize regional regulation of regional transmission issues. Later that year at its Summer Meeting in July 1991, the Executive Committee once again endorsed voluntary regional approaches to the regulation of regional transmission issues as part of broader policy issues reflected in then-pending legislation that later became the Energy Policy Act.

Accordingly, it is safe to say that the Association has been a leader in recognizing the increasingly regional nature of electric bulk power and transmission markets, and the concomitant need to conform the regulatory and system planning process to these market realities. Indeed, increasingly in recent years, it has been the growing conviction of State regulators, as well as consumers, that the jurisdictional structure established by the Federal Power Act and PUHCA is ill-suited to an industry which operates in competitive markets at the regional and wholesale levels while providing monopoly service in local retail markets. We must not forget that it is the retail ratepayer who ultimately pays.

We have long supported broad reform of electric utility jurisdiction to ensure necessary protection for consumers by conforming regulatory oversight to address the changing operations

of this industry, particularly with respect to the acquisition of bulk power at wholesale and interaffiliate transactions. However, we have expressed opposition to the FERC's adoption of a rigid set of rules that could be used to enable the members of "certified" RTGs to avoid or frustrate State regulatory policies.

In sum, we do not object to the implementation of voluntary regional approaches to transmission issues, particularly in the area of long-term planning of the system. However, we firmly believe that any new regional approaches -- through RTGs or not -- must be consistent with State integrated resource planning requirements, siting, land-use and environmental requirements, and ratemaking and cost recovery requirements.

Although we are still reviewing the FERC's July 30 RTG Policy Statement, it appears that the Commission's approach is generally consistent with the way that we think that RTG policies should evolve. By adopting a policy statement rather than a rule, the Commission will allow RTG policy to evolve in a flexible, region-specific way. More importantly from NARUC's perspective, the FERC's statement clearly states that RTG members will be expected to "provide a means of adequate consultation and coordination with relevant state regulatory . . . authorities." It is our hope that parties interested in forming RTGs will see this statement as the FERC's clear signal that formation of an RTG does not relieve them of their obligation to comply with all applicable State and local planning, ratemaking, and environmental requirements.

Beyond the question of State/Federal coordination, it is our preliminary view that the Commission's RTG Policy Statement is a sensible approach to begin sorting out the issues of RTG membership, geographic scope, regional planning, and governance/dispute resolution. We will, of course, continue to consult with our member commissions to address the Policy Statement in greater detail in the weeks to come.

NATIONAL POWER SURVEY

The NARUC has long supported a Federal initiative to update the last national power survey -- conducted over twenty years ago. Clearly, recent changes in the structure and competitive operation of the industry require that some Federal agency -- most likely FERC or the Department of Energy -- conduct a new survey. The NARUC and its members stand ready to provide its assistance.

JOINT FERC/STATE COMMISSION MECHANISMS

The NARUC strongly supports the use of FERC/State joint boards and joint hearings to coordinate State and Federal regulation of the electric industry. Unfortunately, current joint procedures, which are based on section 209 of the Federal Power Act, are ungainly and ill-suited to this purpose. Accordingly, in recent

years the NARUC has consistently advocated amendments to the Federal Power and Natural Gas Act to establish joint board procedures that would provide a useful means to reach joint decisions on broad policy issues of concern to both State regulators and the Commission. (Our draft legislation is attached hereto as Appendix B.) In a nutshell, the problem with section 209 procedures is that they require that FERC include a representative from every State commission in any board which is looking at generic issues. Obviously, a fifty member board is an ungainly body to address issues in a timely manner, and accordingly, section 209 boards have rarely, if ever, been used.

By contrast, the NARUC proposal would establish a more efficient procedure in which representatives of the broader State regulatory community would be nominated by our Association to sit with FERC commissioners to discuss issues of mutual concern and develop recommended policies for the Commission's consideration. Based on our experience with FCC/State joint boards under section 410 of the Communications Act (which incorporates this model), we strongly believe that a similar approach to joint FERC/State decisionmaking would be a success.

There are other procedures such as joint hearings, informal conferences and workshops which also should be pursued. Currently pending before the FERC is our proposal to establish a "collaborative process" for the coordination of State and Federal policies on transmission pricing and access issues. This proposal is based upon our desire to further discussions begun in a series of recent and highly successful FERC/NARUC workshops on such electric policy issues as compliance with the Clean Air Act Amendments and coordination of FERC bulk power pricing policies and State integrated resource planning initiatives. We are hopeful that the "new FERC" will seize the opportunity to use all appropriate means to promote State/Federal dialogue and cooperation. We also support a more flexible interpretation of the of the Sunshine Act to make it easier to conduct informal meetings between State and FERC Commissioners.

CONCLUSION

In conclusion, as the FERC grapples with implementation of the Energy Act, the State commissions are optimistic that past State/Federal conflict will be replaced with collaboration, comity and deference -- in both directions. Thus far, the Commission's decisions on such electric transmission issues as RTGs, reporting and data collection, good faith requests for service, and its proposal on pricing reflect an appropriate recognition that both the Commission and the States have a crucial role to play in ensuring that the ongoing changes in the industry, however difficult, will result improving the well-being of the Nation's electric consumers -- the clear goal that we all share.

APPENDIX A

Resolution on Reform of the Public Utility Holding Company Act

WHEREAS, Legislation is pending before the Senate Committee on Energy and Natural Resources, S. 406, to amend the Public Utility Holding Company Act of 1935 (PUHCA); and

WHEREAS, The legislation would create a new category of electric generator called Exempt Wholesale Generators (EWGs) which would not be subject to the regulatory restrictions imposed on holding companies by PUHCA; and

WHEREAS, The purpose of this bill is to greatly reduce the barriers to entry for holding companies, including electric utilities, to enter wholesale markets and sell power to distribution utilities for resale to consumers; and

WHEREAS, The addition of new EWGs to wholesale markets subject to regulation by the Federal Energy Regulatory Commission (FERC) will erode State control of an increasingly large percentage of the cost of electrical service, particularly if the FERC and the Federal Courts continue to hold, in reliance on Mississippi Power & Light v. Mississippi ex rel. Moore, 487 U.S. __ (1988), that State commissions have severely limited jurisdiction to review the passthrough of purchased power costs in retail rates; and

WHEREAS, By permitting unrestricted utility ownership of EWGs, the legislation creates the opportunity for utilities to cross-subsidize their construction and operation of wholesale power facilities through their retail distribution rates, particularly utilities owning and operating EWGs which sell power to affiliated distribution companies; and

WHEREAS, The substance of this Resolution is reflected by the Resolution of the same Title adopted by the NARUC Executive Committee on July 27, 1989; now, therefore, be it

RESOLVED, That the National Association of Regulatory Utility Commissioners (NARUC), convened in its 101st Annual Convention in Boston, Massachusetts, strongly opposes amendment to the Public Utility Holding Company Act of 1935 unless provisions are included which specifically preserve the legal authority of the respective State commissions to insure that the sale of power by new entrants into wholesale markets is in the interest of retail ratepayers. Such provisions must:

(1) Ensure the right of each State commission to review the prudence of the wholesale purchasing practices of each distribution utility subject to the State commission's authority; and

(2) Preserve the right of each State commission to conduct bidding programs and least cost planning; to determine the appropriate mix of generation, as a

matter of fuel and technology choice and as a matter of ownership; to take actions to insure system reliability; to restrict or prohibit affiliate transactions; and to approve or disapprove the transfer of assets from a utility to another party, free from preemption under Federal statutes or the Commerce Clause; and

(3) Provide a right of access, enabling State commissions to review the books and records of holding companies and all holding company subsidiaries, including non-regulated businesses that transact business with the retail distribution company or EWG entity; and

(4) In the case of an integrated multi-State utility holding company, authorize regional compacts for those States who have jurisdiction over retail subsidiaries of the holding company for the sole purpose of regulating the allocation of costs and/or the prudence of wholesale power purchases by the holding company.

Sponsored by the Committees on Electricity,
Energy Conservation, and Finance and Technology
Adopted November 15, 1989
Reported NARUC Bulletin No. 48-1989, page 11

Resolution Endorsing Legislation to Amend the
Federal Power Act to Reform State/Federal Jurisdiction

WHEREAS, In enacting the Federal Power Act in 1935, Congress granted the Federal Power Commission, predecessor to the Federal Energy Regulatory Commission (FERC), jurisdiction to regulate the wholesale sale and transmission of electricity in interstate commerce while preserving State jurisdiction over local rates and services of utilities; and

WHEREAS, In 1964, the U.S. Supreme Court held in Federal Power Commission v. Southern California Edison Co., 376 U.S. 205 (1964) (the Colton case) that Federal jurisdiction over wholesale sales included entirely intrastate wholesale transactions, thereby extinguishing State intrastate wholesale authority; and

WHEREAS, In a series of decisions culminating in its decision in Mississippi Power & Light v. Mississippi ex rel. Moore, 487 U.S. 354 (1988), the Supreme Court has sharply restricted the authority of the States to regulate the passthrough in retail rates of a utility's FERC-regulated costs of power purchased at wholesale; and

WHEREAS, Despite these decisions, the bulk of electric power costs and rates are determined by State regulatory commissions, including the costs of facilities used to provide wholesale sales and transmission service for which FERC establishes rates and conditions of service. Moreover, States retain exclusive jurisdiction over the siting of transmission facilities used for both inter and intrastate service; and

WHEREAS, In recent years, the electric utility industry has undergone substantial change as a result of increased reliance on wholesale power suppliers, including non-utility generators, greater regional coordination of power supply planning and operations, mergers and consolidations of utility operations in multiple jurisdictions, and increased transmission access by third parties. As a result, the FPA's jurisdictional allocation of authority is no longer consistent with the manner in which the industry now operates; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), convened at its Winter Meeting in Washington, D.C., hereby calls upon Congress to amend the Federal Power Act in order to reform State and Federal jurisdiction over electric utility transactions to conform to the operational reality of the industry; and be it further

RESOLVED, That such amendments to the Federal Power Act be based upon the following principles:

1. Jurisdiction over the retail rates and services of electric utilities shall remain with the States. Such jurisdiction must be strengthened to affirm the authority of

the States to regulate the passthrough of purchased power costs in the retail rates of utilities;

2. Jurisdiction over intrastate wholesale sales and transmission rates, terms and conditions should be returned to the State regulatory commissions;

3. Jurisdiction over multistate transactions (including system cost allocation, bulk power purchases and sales, emission allowance allocations, and use of transmission facilities) within registered holding company systems operating should be lodged in regional regulatory bodies authorized by Congress and established on a purely voluntary basis by the States in which the systems operate. In the event such regional bodies are not formed, or if formed, decline to regulate given issues, jurisdiction shall be lodged in the FERC except to the extent the electric utility subsidiaries of such holding companies are exempt from FERC jurisdiction over such issues pursuant to Section 201 of the Federal Power Act, 16 U.S.C. sec. 824, or successor provision(s). Jurisdiction over multistate transactions of other utility systems should also be exercised by such voluntarily-established regional bodies, but without default to FERC.

4. Congress should authorize the creation of multistate compacts consistent with basic principles of administrative efficiency and fairness. States which voluntarily form such compacts would collectively determine rules of governance and internal procedures; and be it further

RESOLVED, That the following principles govern the siting of transmission facilities to be used in multistate transactions:

1. States exercising jurisdiction over the siting and certification of transmission facilities should not discriminate against interstate facilities, meaning that interstate facilities should be sited, certificated, and otherwise regulated under the same standards and procedures as intrastate facilities.

2. States should retain jurisdiction to make all factual determinations concerning transmission siting. Judicial review of such determinations, whether in State or Federal courts, should not be de novo, assuming the States have conducted evidentiary proceedings.

3. Congress should authorize the creation of multistate compacts which permit willing States to:

   a. Identify regional bulk power market needs for State siting agencies to consider in their respective deliberations; and

b. Plan for the construction of new interstate transmission facilities.

4. Congress should further authorize the creation of multistate compacts which permit willing States in which an interstate transmission facility is proposed to be sited:

a. To issue certificates authorizing the construction of the proposed facility; or

b. If States choose to retain certification authority for themselves, to agree upon and employ a mechanism for a final, binding resolution of a proposed facility siting when the individual States involved have come to conflicting and/or inconsistent determinations in their respective deliberations.

Sponsored by the Committee on Electricity
Adopted February 27, 1991
Reported NARUC Bulletin No. 9-1991, pages 22-23

Resolution Endorsing Joint Boards Between the Federal Energy Regulatory Commission and State Public Service Commissions

WHEREAS, The bulk of electric power costs and rates are determined by State regulatory commissions, including the costs of facilities used to provide wholesale sales and transmission service for which the Federal Energy Regulatory Commission (FERC) establishes rates and conditions of service. Moreover, States retain exclusive jurisdiction over the siting of transmission facilities used for both inter and intrastate service; and

WHEREAS, In recent years, the electric utility industry has undergone substantial change as a result of increased reliance on wholesale power suppliers, including non-utility generators, greater regional coordination of power supply planning and operations, mergers and consolidations of utility operations in multiple jurisdictions, and increased transmission access by third parties; and

WHEREAS, The National Association of Regulatory Utility Commissioners (NARUC) adopted a "Resolution Urging the Congress to Establish Federal-State Joint Boards at the FERC" on November 19, 1986; and

WHEREAS, Authority to convene FERC-State Commission Joint Boards was expressly granted by Section 209 of the Federal Power Act (FPA), 16 U.S.C. 824h (1988); and

WHEREAS, The NARUC adopted a "Resolution Endorsing Legislation to Amend the Federal Power Act to Reform State-Federal Jurisdiction" on February 27, 1991, which called for Congress to authorize the creation of multi-State compacts; and

WHEREAS, Each agency on a Joint Board has jurisdictional authority on issues before the Board, and the Joint Board concept promotes efficiency in regulation through avoiding duplication in the hearing process and promoting consistency in positions of parties; now, therefore, be it

RESOLVED, That the FERC should be encouraged to initiate, or participate in, upon State request, Joint Boards pursuant to the FPA, Section 209, to work in cooperation with affected States to resolve rate issues of mutual concern; and be it further

RESOLVED, That the Executive Committee of the NARUC, convened at its Summer Meeting in San Francisco, California, supports both Joint Boards and multi-State compacts, and delegation of Federal authority to States, which should be implemented as situations merit.

Sponsored by the Committee on Electricity
Adopted July 24, 1991
Reported NARUC Bulletin No. 31-1991, page 18

Resolution on Administrative and Legislative Reform of Electric Transmission Policy

WHEREAS, Electric utility transmission, interconnection and wheeling policies are based upon an outdated Federal regulatory system which has resulted in an irrational jurisdictional allocation of authority under which the States exercise jurisdiction over the siting and cost recovery of transmission facilities, while the Federal Energy Regulatory Commission (FERC) claims exclusive jurisdiction over transmission pricing, and terms and conditions; and

WHEREAS, By the 1978 enactment of the Public Utility Regulatory Policies Act, the FERC's 1985 Notice of Inquiry (NOI) on transmission issues, and the report of the FERC Transmission Task Force, the Federal government has attempted to develop coherent transmission policies, thus far unsuccessfully; and

WHEREAS, The National Association of Regulatory Utility Commissioners (NARUC) supported Federal efforts to generically address transmission access and pricing policies, including the FERC's generic NOI, although we are troubled by the lack of a collaborative approach; and

WHEREAS, The FERC has announced its intention to conduct Federal/State Workshops in the Fall to consider, inter alia, ways in which FERC and State transmission policies and decisions can be better coordinated; and

WHEREAS, Legislation is now pending in the Congress which would amend the Federal Power Act to provide FERC greater authority to order interconnection and wheeling, over utility objections, under pricing and access terms which may affect the interests of the ratepayers; and

WHEREAS, This legislation, while useful in framing this necessary debate, may be premised on the false assumption that the FERC now has or should have exclusive jurisdiction over all issues of transmission access and pricing, including transactions which are intrastate in nature, without regard to the fact that under current regulatory procedures, the States are responsible for authorizing utilities to recover residual costs from native load ratepayers; and

WHEREAS, At its 1991 Winter Meeting, the NARUC Executive Committee adopted a resolution which, inter alia, called for congressional legislation (1) to provide State commissions with clear jurisdictional authority to regulate intrastate transmission transactions; (2) to authorize the voluntary formation of regional bodies to regulate regional transmission planning, siting, pricing, and access issues; and (3) to establish non-discriminatory standards for interstate siting issues; and

WHEREAS, There is a critical need for Federal/State

cooperation to examine, and develop coherent transmission policies; now be it therefore,

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), convened at its Summer Meeting in San Francisco, California, reaffirms its existing resolution on transmission issues described above, and hereby adopts the following principles with respect to administrative and legislative initiatives to reform electric utility transmission policies:

1. It is appropriate for Congress to begin addressing transmission issues.

2. Congress should require that the FERC and the State commissions conduct a joint, comprehensive examination of the current status of the transmission system on a regional and national basis through the use of a new FERC/State Joint Board mandated by Congress, including an analysis, and possible recommendations, on the respective jurisdictional responsibilities of the States and FERC, and principles of transmission pricing. The Joint Board would report to the Congress the results of its inquiry within 18 months of its establishment;

3. The relevant regulatory body needs authority to mandate access to transmission facilities as appropriate;

4. The following elements should be present in any Congressional legislation:

   a. Intrastate transmission transactions should be regulated by the State commissions;

   b. Regional transmission transactions should be regulated by voluntary regional bodies, as described in the earlier NARUC resolution;

   c. Any authority to mandate transmission should prohibit federally mandated retail wheeling and include adequate protection for the interests of retail native load ratepayers;

   d. Congress should provide FERC and/or interstate compacts with sufficient latitude to determine rates and access for interstate transmission services;

   e. Any authority granted FERC to order the construction or expansion of transmission facilities should not preempt State or regional authority. Such jurisdiction should be concurrent.

5. If transmission legislation advances in the 102nd Congress, the NARUC intends to join those utilities, consumer groups, and independent power firms supporting transmission reform in shaping appropriate legislation which includes the above principles. NARUC is particularly appreciative of the willingness of the sponsors of H.R. 2224 to work with us as they consider this legislation;

6. The NARUC strongly suggests that the bills address and accommodate these principles. Since the currently pending transmission bills do not appropriately address the above matters, the NARUC cannot support them as now drafted.

Sponsored by Committee on Electricity
Adopted July 24, 1991
Reported NARUC Bulletin No. 31-1991, pages 14-16

Convention Floor Resolution No. 4

Resolution To Clarify SEC Jurisdiction Under The Public Utility Holding Company Act of 1935

WHEREAS, In 1935, Congress jointly enacted the Federal Power Act (FPA) and the Public Utility Holding Company Act (PUHCA), which established Federal authority to regulate the wholesale rates and services and corporate activities of, inter alia, investor-owned electric utilities; and

WHEREAS, The regulatory provisions of the FPA are administered by the Federal Energy Regulatory Commission (FERC), and the regulatory provisions of the PUHCA are administered by the Securities and Exchange Commission (SEC); and

WHEREAS, In the last decade, the SEC has chosen to deemphasize its administration of PUHCA by calling for the repeal of the statute and reducing the resources it devotes to utility regulation; and

WHEREAS, Legislation is now pending in the Congress which would permit wholesale power generators to become exempt from PUHCA through FERC review of their wholesale power sales; and

WHEREAS, In recent years, litigation over the respective regulatory roles of the SEC and the FERC has caused uncertainty in the utility industry; now, therefore, be it

RESOLVED, That the National Association of Regulatory Utility Commissioners (NARUC), convened at its 103rd Annual Convention and Regulatory Symposium in San Antonio, Texas, states that, as a matter of public policy, action by the SEC should not preclude the FERC or the States from exercising lawful ratemaking authority.

Sponsored by the Committee on Electricity
Adopted November 13, 1991
Reported NARUC Bulletin, No. 47-1991, p. 5

Resolution Regarding Opening Discussions
with the Securities and Exchange Commission
Regarding Regulatory Policy, Procedures, and Philosophies

WHEREAS, The Securities and Exchange Commission (SEC) has been given broad powers to prescribe accounting practices and standards, commonly referred to as Generally Accepted Accounting Principles (GAAP), for companies that fall within its jurisdiction; and

WHEREAS, Most regulated public utilities are subject to the jurisdiction of the Securities and Exchange Commission; and

WHEREAS, State and federal regulatory commissions have the authority to prescribe accounting procedures as well as having jurisdiction over the rates charged by most privately-owned public utilities; and

WHEREAS, Most state and federal regulatory commissions prescribe accounting in accordance with SEC, however, the ratemaking treatment of certain revenues, expenses and capital items may often cause differences in accounting that would not occur under SEC for non-regulated companies; and

WHEREAS, Pursuant to Statement of Financial Accounting Standard 71, such differences are recognized as regulatory assets or liabilities which are not reported by non-regulated companies; and

WHEREAS, These regulatory assets and liabilities are amortized over various periods established by the regulator which may differ from the amortization period considered reasonable by the accounting profession and the SEC; and

WHEREAS, The Securities and Exchange Commission has expressed concern about the existence of regulatory assets under certain circumstances and their associated amortization periods; and

WHEREAS, The Securities and Exchange Commission has begun to have discussions regarding such matters with the accounting profession, utilities, the Financial Accounting Standards Board, and others; and

WHEREAS, The 1992 Energy Policy Act places all regulatory responsibility for foreign diversification activities of registered holding companies at the SEC with no clearly defined role for State regulators; and

WHEREAS, The Federal Energy Regulatory Commission (FERC) and perhaps the States have been pre-empted from exercising regulatory authority over affiliated coal purchasers within registered holding companies; and

WHEREAS, The accounting treatment of revenues, expenses, and

deferred revenues associated with utility energy efficiency programs will be critical to the success of those programs and to the success of emerging initiatives in regulatory reform and incentive regulation; now, therefore, be it

RESOLVED, That the National Association of Regulatory Utility Commissioners, convened at its 104th Annual convention in Los Angeles, California, authorize the chairs of the Committees on Electricity, Finance and Technology and Energy Conservation to participate in the discussion on these matters and seek to pursue a dialogue with the SEC which would provide the SEC with state regulatory perspectives in future meetings on:

1. regulatory policy procedures and regulatory assets;

2. the foreign investment activities of registered holding companies;

3. interaffiliate transactions and their effects on registered holding companies; and

4. the treatment of expenses and revenues associated with utility energy efficiency programs and associated mechanisms for incentive regulation; and be it further

RESOLVED, That copies of this resolution be promptly forwarded to the U.S. Securities and Exchange Commission and the Financial Accounting Standards Board.

Sponsored by Committee on Finance and Technology
Adopted November 18, 1992

Resolution Encouraging State Regulatory Commissions to Consider Reforming Transmission Pricing Policies for Retail Electric Services

WHEREAS, On October 24, 1992, the President signed into law the Energy Policy Act of 1992 (the Energy Act), which includes provisions authorizing the Federal Energy Regulatory Commission (FERC) to order electric utilities to transmit power at wholesale at the request of such third parties as independent power producers and other utilities; and

WHEREAS, The Energy Act is intended to result in greater third party use of transmission facilities that were primarily designed to serve retail ratepayers and whose investment costs are included in retail rate base and recovered from native load consumers in bundled rates for retail service; and

WHEREAS, Recent FERC decisions may not be fully compensatory for utilities that provide wholesale transmission services for third parties and may leave the residual costs of transmission facilities to be recovered from native load consumers; and

WHEREAS, The recovery of residual transmission costs through bundled retail rates may facilitate noncompensatory wholesale transmission prices; and

WHEREAS, Since Titles I and VII of the Energy Act require State regulators to consider the adoption of regulatory policies in the areas of integrated resource planning, demand side management programs, and
bulk power purchases by retail utilities, it is appropriate that State commissions also examine transmission pricing, cost allocation and recovery issues, and the role of incentive and price cap mechanisms; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), convened in its Winter Meeting in Washington, D.C., hereby recommends that each State regulatory commission reexamine its policies with respect to the recovery of the costs of rate-based transmission investments through bundled retail rates, and in the interest of protecting native load retail consumers, consider such alternative policies as (1) unbundled rates for retail service, (2) removal of transmission assets used primarily for wholesale transactions from retail rate base, (3) caps on the "residual revenue requirement" assigned retail ratepayers, (4) reallocation of the costs of transmission assets, and (5) incentives for electric utilities to operate their transmission facilities efficiently. Such incentives should include appropriately balanced opportunities for gains as well as risks of loss. This listing is not meant to preclude consideration of other mechanisms which protect retail ratepayers while responding to increased competition in bulk power markets; and be it further

RESOLVED, The NARUC restates and emphasizes its firm conviction that the optimal mechanism for the formulation of electric transmission policy is through joint boards or other forms of collaboration and cooperation between the FERC and State commissions.

Sponsored by the Committee on Electricity
Adopted March 3, 1993
Reported NARUC Bulletin, No. 10-1993, pp. 15-16

Resolution Supporting Legislation to Clarify Jurisdiction of Federal and State Commissions Concerning Regulation of Investor-Owned Electric Utilities Serving Retail Ratepayers

WHEREAS, In 1935, Congress jointly enacted the Federal Power Act and the Public Utility Holding Company Act (PUHCA) of 1935, which establish Federal authority to regulate the wholesale rates and services and corporate activities of, inter alia, investor-owned electric utilities; and

WHEREAS, Last year, Congress enacted the Energy Policy Act of 1992 (P.L. 102-486), which permits wholesale power generators to become exempt from PUHCA through review by the Federal Energy Regulatory Commission (FERC) of their wholesale power sales; and

WHEREAS, Title VII of P.L. 102-486 contains provisions that allow investor-owned utilities to own and operate retail electric utilities outside the United States, subject to the review of State regulatory commissions in the case of non-registered utilities and subject to review of the Securities and Exchange Commission (SEC) in the case of registered utility systems; and

WHEREAS, The amendments made to the PUHCA by the Energy Policy Act failed to address several issues of importance to State regulatory commissions, including, but not limited to, the following:

(1) codification of the right of State public utility commissions to review the reasonableness of wholesale purchases by electric utilities that serve retail ratepayers;

(2) providing jurisdiction to State regulatory commissions over intrastate wholesale power transactions by electric utilities serving retail ratepayers;

(3) authorizing State commissions to engage in regional integrated resource planning for registered holding company utility systems; and

(4) clarifying and rationalizing the roles that the SEC, FERC and State commissions will assume in regulating the terms and conditions of wholesale contracts entered into by electric utilities that serve retail ratepayers as well as diversification of economic activity by utilities; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), convened at its Winter Meeting in Washington, D.C., is supportive of efforts in the Congress and in the Administration to examine thoroughly the issues listed above and where necessary enact legislation or redirect resources subsequent to such an inquiry.

Sponsored by the Committee on Electricity
Adopted March 3, 1993
Reported NARUC Bulletin, No. 10-1993, pp. 13-14

Resolution on Reform of the Electric Utility Transmission Pricing Policies of the Federal Energy Regulatory Commission

WHEREAS, On June 30, 1993, the Federal Energy Regulatory Commission (FERC) issued a Notice of Technical Conference and Request for Comments ("Notice") in Docket RM93-19-000, which included a Staff Discussion Paper requesting written comment on 36 questions FERC might consider should it decide to revise its policies for pricing electric transmission services; and

WHEREAS, The Staff Discussion Paper offers the following criteria for consideration concerning the FERC's transmission pricing policies:

o Promote efficient use of and investment in the transmission grid and provide appropriate price signals to transmission customers. To the extent practicable, prices should accurately:

1. account for transmission constraints

2. reflect any prudent costs incurred as a result of transmission service

3. reflect the actual power flows of the transmission service

4. reflect the distance- and location-sensitive costs of the transmission service

5. reflect the prevailing direction of the flow, distinguishing between "with the flow" and "counter flow"

o Address any transition problems arising from the reform

1. balance equity considerations associated with any reform with the potential efficiency improvements

2. mitigate the hardships arising from any reform

o Allow customers an option to have stable prices over time

o Be simple to implement and to administer; and

WHEREAS, The National Association of Regulatory Utility Commissioners (NARUC) understands the Staff Discussion Paper's criterion regarding the use of actual power flows to include system power flows as predicted by appropriate modeling techniques; and

WHEREAS, The FERC's transmission pricing policy is of critical concern to the State regulatory commissions because, inter alia, they exercise substantial jurisdiction over transmission issues, including the allocation and recovery of transmission costs from retail ratepayers and the need for and siting of new transmission facilities; now therefore be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), convened in its 1993 Summer Meetings in San Francisco, California, commends the FERC for the issuance of the Notice, and strongly believes there is a compelling need for the Commission to institute a generic examination of its transmission pricing policies in light of the Energy Policy Act's recent amendments to the Federal Power Act and growing competition in the industry; and be it further

RESOLVED, That the NARUC Executive Committee concurs with the FERC staff that the pricing criteria described above should be considered in developing FERC's transmission pricing policies; and be it further

RESOLVED, That in addition to concurring with the consideration of those criteria, the NARUC Executive Committee recommends adoption of the following principles for reform of FERC transmission pricing policies:

1. State and Federal transmission pricing and cost recovery policies must be coordinated through a collaborative process;

2. The FERC's pricing policies should reflect differences between the rights and responsibilities of native load customers (including retail and wholesale requirements customers) and other users of the transmission system;

3. The FERC's pricing policies should be flexible in order to reflect regional differences and changing conditions in bulk power markets;

4. The FERC should seek to promote the voluntary resolution of case-specific pricing issues by giving appropriate deference to consensual agreements produced through arms-length negotiations involving all affected parties; and

5. Any reform of FERC pricing policies must not compromise system reliability; and be it further

RESOLVED, That the NARUC Executive Committee strongly reaffirms its November 1992 "PROPOSAL TO THE FERC FOR CONSULTATIVE PROCESS ON ELECTRICITY TRANSMISSION ISSUES," and respectfully requests that the Commission convene a special session of the Technical Conference announced in Docket RM93-19-000 in which State commissioners would have an opportunity to meet in public session with the FERC Commissioners to discuss the issues raised in the Notice.

Sponsored by the Committee on Electricity
Adopted July 28, 1993

APPENDIX B

THE NEED FOR FEDERAL/STATE JOINT BOARDS
IN PROCEEDINGS OF THE
FEDERAL ENERGY REGULATORY COMMISSION:
A PROPOSAL BY THE NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS
August 1993

The National Association of Regulatory Utility Commissioners (NARUC) proposes that Congress enact amendments to the Federal Power Act (FPA) and Natural Gas Act (NGA) to establish a new statutory procedure requiring the Federal Energy Regulatory Commission (FERC or the Commission) to refer certain issues to a Federal/State Joint Board. Attached hereto is draft legislation which would provide a framework for improving cooperation and coordination between State and Federal regulators of energy utilities.

The NARUC's support for the use of Joint Boards at the FERC is based upon our experience with the highly successful Joint Boards established under section 410(c) of the Communications Act. 47 U.S.C. sec. 410(c). The Association believes that the communications joint boards established in recent years have been an indispensable tool to foster cooperative solutions to the many challenges resulting from the break-up of the Bell system and the development of an increasingly competitive marketplace for communications services. Similar competitive forces have developed in markets for gas and electricity -- forces which will continue to affect the regulation of energy utilities at both levels of government.

Accordingly, the NARUC believes that the time is right to adopt the communications Joint Board model for certain proceedings at the FERC. Given the momentous changes in energy markets and industry structure which are now occurring, the need for a Joint Board mechanism to coordinate State and FERC policymaking has become acute. Our proposal, which simply provides the State commissions a formalized mechanism to advise the FERC on generic "rulemaking-type" issues of National concern, addresses this need in a direct way while providing the Commission with full, unfettered authority to resolve issues within its jurisdiction. Although the FPA and NGA both now authorize the establishment of Joint Boards, these provisions are rarely used because the FERC is under no obligation to use them and because their procedures are ambiguous in some areas and cumbersome in others.

The new Joint Boards that would be created by the attached draft would correct these problems. First, the FERC would be required to establish a Joint Board upon the request of two-thirds of the State commissions affected by a particular issue or set of issues. Second, these amendments would provide clear guidelines for the type of proceedings eligible for Joint Board treatment, as

well as the procedures to be used in establishing and operating the Boards:

- o Joint Boards would be used in generic proceedings commenced through the issuance of a Notice of Inquiry or Notice of Proposed Rulemaking. To ensure expeditious consideration of the issues raised, the amendments would require Joint Board referral within 30 days of commencement of the proceeding.

- o Joint Boards would have the legal status of an administrative law judge. Their job would be to undertake fact-finding and analysis of public comments, convene public conferences as appropriate, and then, prepare a recommended decision for consideration by the full FERC, which would then be free to accept, modify, or reject the Board's recommendations.

- o Joint Boards would be comprised of seven commissioners -- three FERC commissioners and four State commissioners nominated by the NARUC. The Chair of a Board would be an FERC commissioner.

- o The FERC would have full authority to establish procedures to govern Joint Board deliberations, including the issuance of deadlines for Board action.

The NARUC believes that its proposal is worthy of the support of the FERC and enactment by the Congress. Our experience with the communications Joint Boards, which have assisted the FCC in resolving many difficult and contentious issues, leads us to conclude that Joint Boards at the FERC would neither confuse nor delay Commission decisionmaking. Rather, by bringing State regulators into the process at an early stage, Joint Boards would ensure that State commission representatives have the opportunity to do more than merely comment upon major regulatory initiatives that the Commission chooses to pursue, thereby enhancing the legitimacy of the FERC's final product.

In sum, the effective use of Joint Boards would bring a new perspective to the Commission's policymaking process. While the Commission's recent use of workshops and other informal means to involve State commissions have been deeply appreciated, it remains difficult for the FERC, or indeed any Federal agency sitting in Washington, to stay in touch with the interests of local utility consumers who are directly affected by Federal regulatory policies. The NARUC's Joint Board proposal would bring to bear the views of State regulators who know and understand these local impacts -- a point of view that can only improve the Commission's decisionmaking process.

NARUC FEDERAL-STATE JOINT BOARD AMENDMENTS TO THE FEDERAL POWER AND NATURAL GAS ACTS

Federal Power Act

Amend section 209(a) of the Federal Power Act (16 U.S.C. 824h(a)) as follows:

Renumber existing section 209(a) as 209(a)(1).

Add the following new paragraph following 209(a)(1) to read as follows:

"(2)(A) The Commission shall convene, upon the request of at least two-thirds of the affected State commissions having jurisdiction over sales of electricity, a Federal-State joint board and refer to it a proceeding regarding a national matter of Federal-State concern in the regulation of electric utilities. Such joint board shall be established only for a proceeding which is instituted pursuant to a Commission notice of proposed rulemaking or notice of inquiry, and referral to the joint board shall occur with 30 days after public notice is given in the Federal Register of the institution of the proceeding.

"(B) The State members of a joint board shall sit with the Commission en banc at any oral argument or public conference that may be scheduled in the proceeding. The Commission shall also afford the State members of a joint board opportunity to participate in its deliberations, but not to vote, when it has under consideration the recommended decision of a joint board or any further decisional action that may be required in the proceeding.

"(C) A joint board shall be composed of three members of the Commission and four affected State commissioners, as identified by subparagraph (A) above, nominated by the National Association of Regulatory Utility Commissioners and approved by the Commission.

"(D) The Chairman of the Commission, or another Commissioner designated by the Commission, shall serve as chairman of each joint board.

"(E) The establishment of a joint board shall not enlarge the jurisdiction of the Commission, and nothing in this Act or in the amendments made by this Act shall be construed to change the jurisdiction of the Commission."

Natural Gas Act

Amend section 17(a) of the Natural Gas Act (15 U.S.C. 717p(a)) as follows:

Renumber existing section 17(a) as 17(a)(1).

Add the following new paragraph following 17(a)(1) to read as follows:

"(2)(A) The Commission shall convene, upon the request of at least two-thirds of the affected State commissions having jurisdiction over sales of natural gas, a Federal-State joint board and refer to it a proceeding regarding a national matter of Federal-State concern in the regulation of natural gas utilities. Such joint board shall be established only for a proceeding which is instituted pursuant to a Commission notice of proposed rulemaking or notice of inquiry, and referral to the joint board shall occur with 30 days after public notice is given in the Federal Register of the institution of the proceeding.

"(B) The State members of a joint board shall sit with the Commission en banc at any oral argument or public conference that may be scheduled in the proceeding. The Commission shall also afford the State members of a joint board opportunity to participate in its deliberations, but not to vote, when it has under consideration the recommended decision of a joint board or any further decisional action that may be required in the proceeding.

"(C) A joint board shall be composed of three members of the Commission and four affected State commissioners, as identified by subparagraph (A) above, nominated by the National Association of Regulatory Utility Commissioners and approved by the Commission.

"(D) The Chairman of the Commission, or another Commissioner designated by the Commission, shall serve as chairman of each joint board.

"(E) The establishment of a joint board shall not enlarge the jurisdiction of the Commission, and nothing in this Act or in the amendments made by this Act shall be construed to change the jurisdiction of the Commission."

Mr. SYNAR. Thank you, Mr. Russell.

The chair recognizes himself for 5 minutes, and we will proceed under the 5 minute rule.

Mr. Rezendes, let's start with you. Before we get down to specifics, are long processing delays typical of the electricity program at FERC?

Mr. REZENDES. No, sir. I think from—you can see from our first applications processing chart here we show that basically 96 percent of the applications received are processed in less than 6 months.

Mr. SYNAR. Has this always been true or has there been improvement in that area?

Mr. REZENDES. This is significant improvement from when we last looked at FERC's overall processing of not only electricity but gas and other applications in the early 1980's. I believe in the early 1980's, we had quite a few that were over 4 years.

Mr. SYNAR. How many applications did you study during this period?

Mr. REZENDES. We studied 4,475. Those were dockets, not exactly applications. The way the dockets break out, they are into various issues, some uncontested, which can go through the various different systems and some may require a hearing, but over 4,475.

Mr. SYNAR. For the benefit of some of our freshmen members, why don't you take us step-by-step through the process that FERC uses in acting on an electricity application.

Mr. REZENDES. OK. Probably the easiest way to begin is appendix I of my statement that has a flow chart as to how the applications proceed. Maybe I could walk you through there.

When an application first comes in, FERC has about 60 days to act on it. That is critical for a rate case because if they don't take action within 60 days the rate becomes effective.

Mr. SYNAR. That is page 14?

Mr. REZENDES. That is correct.

Once the application is received and it is deemed complete, it is put in the Federal Register, people have an opportunity to comment on it and respond back. Then the staff makes a determination whether it is a routine application or one that is nonroutine.

Routine applications are the first column on the left, and they are basically decided by the chief of the Office of Electric Power Regulation [OEPR], and those are the bulk, 80 percent fall into that.

An application becomes nonroutine if it is contested, involves legal or policy issues, or various other things; then it has to go to the Commission for review and adjudication. Once it is put into the nonroutine category, which are those columns on the right, it then proceeds through the review process.

The Commission can decide an uncontested application and if it is not contested just issue an order and then proceed. The applications shown by the second bar on our chart, averaged about 6 months.

In the last two columns are the ones that are scheduled for a trial-type hearing. I will take settlements first. It goes through the Commission, scheduled for a formal hearing, and the last column shows that the parties reach a voluntary settlement. This is, they

reach some consensus among themselves how to resolve the issues and FERC approves that, and those on average, take a little over 1 year.

Again, I want to emphasize that it is a very small number of the 4,500 that we looked at. That is only 86 applications that fall into that category. The last group are those which require a trial-type hearing, through an administrative law judge proceeding, which requires witnesses and evidence and then is reviewed by the Commission and they can either accept the administrative law judge's decisions in total or revise it and make whatever changes they would like, and those take the longest.

They involve legal issues. They are contested. They are usually rate cases, and that is the final bar we have in that first chart, which require almost 3 years to decide. Again, those are a relatively small number, and there are just 86 of those cases during the 3-year period we looked at.

Mr. SYNAR. You are using that second chart that you have there, and for the members, that chart is on page 29 of the GAO report.

Mr. REZENDES. It is also appendix II of my testimony.

Mr. SYNAR. Give us an idea of the processing time for each category of application.

Mr. REZENDES. OK. Dave, you want to run through those.

Mr. WOOD. Well, briefly, I will just describe what those categories are. Rate changes, of course, account for almost half of the applications FERC receives. The other types are——

Mr. SYNAR. What is a rate change application? Just define that for us.

Mr. WOOD. That is when a utility comes in to either propose or change an existing rate for the transmission or sale of electric energy.

Mr. SYNAR. That is wholesale?

Mr. WOOD. That is wholesale, yes.

Mr. SYNAR. Go ahead.

Mr. WOOD. Complaint applications are requests for FERC to review or take action against a utility alleged to be in violation of some order or statute or regulation administered by FERC, for example a complaint that they are charging excessive rates. Rehearing requests are appeals for FERC to reconsider a previous decision. Qualifying facilities applications are simply requests from certain electricity producers who are seeking status as qualifying facilities under the PURPA, the Public Utility Regulatory Policies Act, which gave them certain market advantages. Compliance actions are requests for FERC to certify compliance with the terms of a previous order.

Corporate action applications are requests for FERC approval of utility mergers or certain other transactions such as securities issuances or purchases. Interlocking position applications are notifications basically that a person is seeking to become an officer or director of more than one public utility or related business.

Federal rate reviews are simply rate proposals by the Federal Power Market Administration that sell power from hydroelectric dams, Federal dams.

Declaratory orders are requests for FERC to basically interpret a statute, a rule, or an order; and court remands are directives from Federal courts that require a followup.

These typically come from an appeal to a court from a FERC order, and the numbers, as you can see, again rate changes account for about half, qualifying facilities represent a large number, the others are relatively small.

Mr. SYNAR. What are the major causes for the delay?

Mr. REZENDES. Two basic ones. One is incomplete applications. It takes a while to get all the data and the information; and the other is if it involves a factual policy or a legal issue, then it becomes a nonroutine and requires more analysis.

Mr. SYNAR. Those are the same things we saw during the gas pipeline hearings; correct?

Mr. REZENDES. Yes, sir, that is correct.

Mr. SYNAR. Now, when does the staff make a decision on an application that it is going to require action by the Commissioners?

Mr. REZENDES. When it first comes in after the application is deemed complete—that is all the information is there—the staff makes a decision whether it is routine or not routine based on whether there are legal or policy issues that need to be addressed.

Mr. SYNAR. One final question. On these applications, which ones are taking up the most time? It is not the routine ones; correct?

Mr. REZENDES. Correct. It is the nonroutine, especially those that involve rate issues, those that are contested, those that involve legal and policy decisions that are changing the direction of the Commission, those are the ones that take the longest, and as we have seen those account for 86 and almost 3 years to complete.

Mr. SYNAR. Mr. Hastert.

Mr. HASTERT. Thank you, Mr. Chairman. Mr. Rezendes, what time period did your study cover?

Mr. REZENDES. A 3-year period from 1990 through 1992.

Mr. HASTERT. So it really was before the new public utility or our new act took place?

Mr. REZENDES. Yes, that is correct. Right.

Mr. HASTERT. There are a lot of changes in that act, it really changes the agency's role.

Mr. REZENDES. Yes.

Mr. HASTERT. In your study, how many of those cases involve PURPA issues? Do you remember a percentage?

Mr. REZENDES. I don't know if we had a percentage on it, if we broke them out. It was more by the categorizations you see on the right chart: Rate changes, complaints, rehearing requests. We didn't slice it that way.

Mr. HASTERT. So then you don't really know how many of those involve PURPA issues?

Mr. REZENDES. We could take a guess.

Do you know what a guess would be?

Mr. WOOD. I am not sure if I know—fully understand what you mean by PURPA issues. Obviously, the qualifying facilities' request all stem from that.

Mr. HASTERT. When you talk about wholesale transmission, what the cost of fuel is—it goes back to the PURPA. A PUHCA issue is a transmission issue.

Mr. WOOD. As Mr. Rezendes said, we didn't slice it that way.

Mr. HASTERT. So what you are saying is the way that FERC has to divide its issues aren't the way that you necessarily divided the issues?

Mr. REZENDES. Well, these are the FERC categorizations. We just—we are using their data and their categorizations of how they classify the dockets, various dockets that they have to review.

Mr. HASTERT. As this new bill takes place, as the new act takes place, you will see a different role, at least in my opinion and I think in most people's opinion.

The act said the transmission access begins to be a competitive business. It starts to open up. And, of course, FERC has oversight of it. But you go from a regulated industry to one more competitive.

In your opinion—of course, what you are looking at is the time of hearings and determination of those hearings. In your opinion, is FERC in the mode to start to move its jurisdiction and its views?

Mr. REZENDES. We are uncertain. To date, they have.

Those applications that came in—for example, for EWG's that have come in, they have met the timeframes, been able to process them. We just don't know in terms of what the volume of applications are going to be, the complexity of them, or whether they are going to be contested. That will decide whether, in fact, they are suitably staffed to deal with them.

As of right now, I would say yes.

Mr. HASTERT. Probably a lot of those new applications are going to be contested because the whole industry has to change its mode.

I know in my home State one of the largest generators of electricity is changing its mode. I mean, it is spinning off facilities and doing things like that, and I am sure they are going to end up being contested. So there is going to be a lot of those types of issues that are going to have to be settled to implement the new law.

So I think it behooves us also to make sure that in your views—in a future view of this Commission—that they have the ability to gear up to a new mode and a new change.

Mr. Russell, you are from the State of Michigan, is that correct?

Mr. RUSSELL. Yes, sir.

Mr. HASTERT. You are also a delegate to NARUC?

Mr. RUSSELL. I am chairman of the electricity committee.

Mr. HASTERT. For the record, is NARUC an official body or is it a——

Mr. RUSSELL. It is a nonprofit, quasi-governmental body comprised of all of the 50 States, plus the District of Columbia, and Puerto Rico.

Mr. HASTERT. And quasi-governmental meaning what?

Mr. RUSSELL. In that we come together in a policymaking fashion, but we have no ability to issue orders or anything from NARUC itself.

Mr. HASTERT. So you can conspire with different States on how you are going to handle things?

Mr. RUSSELL. Correct.

Mr. HASTERT. You are not tied by antitrust legislation or anything?

Mr. RUSSELL. No, we are not.

Mr. HASTERT. Also, how are you funded?

Mr. RUSSELL. We are funded right now from cab card fees from motor carriers, also called bingo stamps.

Mr. HASTERT. Which are not going to happen anymore, is that right?

Mr. RUSSELL. We are looking at trying to look at what other types of funding mechanisms we would have available to us, like possibly having contributions of dues from individual States.

Mr. HASTERT. So you are actually going to start to charge member States dues instead of being at the public trough.

Mr. RUSSELL. But the dues comes from utility assessments.

Mr. HASTERT. I understand. So the ratepayers are still paying for your meetings in San Francisco and traveling around the country and different things like that?

Mr. RUSSELL. Correct.

Mr. HASTERT. I just wanted you to know it was my legislation that did away with the bingo stamps. Thank you.

Mr. SYNAR. You know, you keep on this route they are going to make me look like a puddy cat.

Mr. McHugh, for 5 minutes.

Mr. MCHUGH. Thank you, Mr. Chairman.

A couple of clarifying questions, Mr. Rezendes.

Moving to your appendix 2 on the category of interlocking positions, could you flush out for me a bit what the nonroutine application might contain that would stretch those out so demonstrably between the 93 days in the routine application and the 509 in the nonroutine?

Mr. REZENDES. Oh, sure. Take, for example, a rate change. It could involve, oh, a different way to calculate that. It could be contested by the various people who have been impacted by it.

Mr. MCHUGH. Excuse me, sir. Perhaps I didn't speak clearly enough. I was interested in just the interlocking positions category.

Mr. REZENDES. Oh, I see. Under seven. You mean, why those seven would be nonroutine?

Mr. MCHUGH. Yes.

Mr. REZENDES. Basically, the reason FERC reviews interlocking positions is for conflict of interest. I don't recall the specific cases, these seven cases, but I would imagine that there must have been some concern about conflict of interest, and I guess there were the legal issues of sorting those out. I don't recall specifically what those seven were.

Mr. MCHUGH. Some interlocking positions are more complex than others?

Mr. REZENDES. I would think so. FERC may have an answer for you when they testify a little later.

Mr. MCHUGH. OK.

Mr. Russell, you were speaking about your concerns in your testimony with respect to possible preemption of State regulatory bodies and the Pike County doctrine.

Mr. RUSSELL. Correct.

Mr. MCHUGH. You spoke, as I recall, with some confidence or optimism about court decisions since then. What has the legal history been since the change—the new policy occurred? Have there been definitive court decisions on the States being preempted on that?

Mr. RUSSELL. There are no pending cases regarding attacks on Pike County doctrine at this point in time. There have been in the past. It has not gone to the Supreme Court, so it is not final law.

The concern which States would have is that we may have to go back into litigation in order to protect a right that we feel should be codified straight up by the Congress that gives specifically the right to State commissions to review the prudence of those types of management decisions.

Mr. MCHUGH. So there have been no definitive court decisions since that time?

Mr. RUSSELL. Correct.

Mr. HASTERT. Would the gentleman yield for a second?

Mr. MCHUGH. Absolutely.

Mr. HASTERT. But, specifically, in the Energy Act that we passed last year the Congress didn't give the States those rights, did they?

Mr. RUSSELL. They did not take them away.

Mr. HASTERT. We didn't extend additional rights, either, for a reason?

Mr. RUSSELL. No, you did not.

Mr. HASTERT. Thank you. Yield back.

Mr. MCHUGH. Perhaps we should talk about this sometime, Mr. Hastert.

My next question is a followup because you also referred to Senate bill S. 2607 on the authorization of compacts to address that situation. Can you give me an update on that particular issue?

Mr. RUSSELL. Our concern with respect to—and this is on the regional compacts, the Bumpers bill—our concern is that there are some regulatory gaps that exist in current law, and those gaps are best filled by the ability of State commissions to have at least a shot at trying to resolve those questions before—if there is an opportunity to resolve them before there becomes a problem.

Right now, I don't know the status of S. 2607, but it is still the position of NARUC and the State commissions that States are the appropriate place where planning should be taken care of, siting issues should be taken care of. And we have also argued in the past for intrastate responsibility of wholesale transactions, but Congress didn't see fit to authorize that.

Mr. MCHUGH. My understanding of the compact process—and it may be somewhat flawed—is that any group of States may apply for compact status within certain jurisdictions and then Congress may consider that. Have there been any compact applications in this regard beyond S. 2607?

Mr. RUSSELL. I don't believe that there have been.

Mr. MCHUGH. Thank you.

Mr. RUSSELL. I think one of the concerns has been the reluctance of the FERC to go along with us on these types of compacts and what the legal status of that would be.

Mr. MCHUGH. Thank you, sir. I yield back.

Mr. SYNAR. Mr. Mica for 5 minutes.

Mr. MICA. Thank you, Mr. Chairman.

I was interested in some of the recommendations that Mr. Rezendes made. I noticed in these recommendations that there is a management information system that you asked to be upgraded. Now, it is my understanding that the changes in the law took place

in 1992, and the study of the number of cases was from 1990 to 1992, is that correct?

Mr. REZENDES. That is correct.

Mr. MICA. Is there any indication of what type with it—the changes in legislation, it is also my understanding that they are going to have a lot more cases to consider because they have got increased areas, wholesale, and transmission services. Has that taken place? Is there now a flood of those applications?

Mr. REZENDES. No, there really isn't a flood, and they have been able to deal with those as they have come in with relative ease.

But, basically, our recommendation on the management information system that they have, the KICTS system, as basically there is some—when we reviewed this, as we did in the natural gas pipeline application process, we found that some key dates weren't being recorded and identified. And our basic suggestion is that if they track those key dates they would be better aware of where the bottlenecks are and where the times are and where they are sitting in various places so they could go back and analyze it and take action if they would like.

Mr. MICA. But these recommendations are now here in this report. Are you aware that they are implementing them or are on their way to, say, setting targets and also improving this management information system?

Mr. REZENDES. They are on the gas pipeline applications. We are not sure whether they are going to implement it on the electricity applications yet. This report just came out. We have not heard a response back from FERC as to how they plan to proceed.

Mr. MICA. Where there are States that have these similar regulatory processes with public service commissions, was there any thought to comparing the time that elapses for consideration, similar considerations of applications?

Mr. REZENDES. No, we didn't do that analysis.

Mr. MICA. What do you see is the key to speeding up the process? Would it be just setting some timetables? I guess this would be more within the purview of the regulatory Commission rather than a legislative act.

Mr. REZENDES. I think that is a fair characterization. I don't want to leave you the impression that we are unhappy with the speed with which these are being processed. We are not. In less than 6 months 96 percent are processed, 80 percent within 2 months, which is a relatively good track record. I think there are opportunities to improve that even more.

I guess the real question Mr. Hastert raised is with the EPACT now taking effect and new applications coming on board. What is the impact going to be and can they, in fact, deal with that kind of workload? And I think it is uncertain right now.

Mr. MICA. Last question.

If there is a bottleneck with the cases, that some of them took, you know, an extremely long time, is there some complaint process or is there some remedy or did you recommend some specific timetable be instituted for appeal or processing?

Mr. REZENDES. Not so much in terms of regulatory timeframes or penalties for not following a specific timeframe. Rather, what we

were impressed with is the time it takes to resolve nonroutine applications when there is a settlement.

And there is an Administrative Dispute Resolution Act which provides alternative mechanisms which provides for mediation and various other kinds of things that might be used to speed up those few applications that take it seems an inordinate amount of time. Those are what is really skewing the average, those 4 percent. We think there are opportunities in the new act, if implemented, to do some of those things.

Mr. MICA. Thank you.

Mr. SYNAR. Ms. Pryce for 5 minutes.

Ms. PRYCE. Thank you, Mr. Chairman.

Thank you, gentlemen, for your testimony this morning.

I really have no questions.

Mr. SYNAR. Victor, I understand that an exempt wholesale generator program is going pretty well at FERC and that properly completed applications are processed within 60 days. And that was what was anticipated, is that right?

Mr. REZENDES. That is correct. Yes.

Mr. SYNAR. Is there any evidence that the workload for this new category is going to burden FERC?

Mr. REZENDES. Not to date. We don't know what is going to happen in the future.

But as of the last time we looked at the numbers, which was the end of July, they had received 61 applications. Forty-four were processed within the required 60-day timeframe. I believe nine were denied, two were withdrawn, and six are still pending. So that shows that they were able to meet those targets.

Mr. SYNAR. Let's talk about transmission access, for example, the section 211 applications.

First of all, explain for us how that provision of EPACT works.

Mr. REZENDES. OK. Basically, FERC has the authority to open up the transmission access which is basically the high voltage line movement of electricity, not the local distribution system. And, basically, it gives them the authority to open that up for wholesale generators to basically sell electricity.

Mr. SYNAR. All right. So if the wholesale electricity seller wants to sell its power to a utility that is not located near its facilities, it needs a way to get it connected to the buyer through a connection of transmission lines, correct?

Mr. REZENDES. That is correct. Yes.

Mr. SYNAR. Now without the transmission access changes in EPACT opening up what is now a virtual monopoly, wouldn't it be difficult to penetrate that wholesale market?

Mr. REZENDES. It would make it less competitive.

There are things that a wholesaler can do. He can locate, for example, within that boundary and sell his electricity, but then, to the extent he is denied access or has limited access, it would limit competition.

Mr. SYNAR. Prior to Congress acting on EPACT last year, FERC had issued only one transmission order and that was a result of a settlement, is that correct?

Mr. REZENDES. That is correct.

Mr. SYNAR. Has FERC issued any transmission orders under EPACT?

Mr. REZENDES. No, it has not.

Mr. SYNAR. All right. Now, I understand that while the test for ordering transmission access is much easier under EPACT than it was under PURPA that there are still a number of conditions which FERC must find. And some of that analysis may require a lot of work and expertise, I am told. What are those conditions?

Mr. REZENDES. Basically, there are several.

One, it still has to be in the public interest, not unreasonably impair the reliability of the electric service; and, two, that it permits cost recovery. And these are just and reasonable and not unduly discriminatory.

Mr. SYNAR. Some of these are old ground for FERC, and some are new. Is this going to cause longer processing times or shorter?

Mr. REZENDES. It will be a different processing. It is really hard to say exactly how that is going to work. They are going to require different skills in terms of looking at transmission and the capability of how electricity flows through the transmission lines.

Mr. SYNAR. Now, the issue raises some interesting questions about personnel, and I want to explore this if I could.

Let's talk about technical, physical, and engineering questions if we could. Has FERC hired any electrical engineers to augment their staff?

Mr. REZENDES. Not that I am aware of as a result of the act. They already had some technical expertise. I believe they had 15 engineers. I think 13 of those were electrical engineers, and 3 were general engineers.

Mr. SYNAR. Now that could be a cause of delay, could it not?

Mr. REZENDES. It could be. It depends, again, on the application and the complexity and the contested nature of it, but it could in the future.

FERC is seeking additional expertise—I think they recognize this—and they are trying to get the numbers of people and the skills of people that they need to address these future applications.

Mr. SYNAR. All right.

Now another one of the things your report identifies is that FERC would be collecting and analyzing various kinds of information new to the Commission, and you included in that design, capacity, configuration, cost, operation of utilities, transmission facilities. So can we expect all those factors involved to mean longer delays, too?

Mr. REZENDES. Again, we are unsure. It depends on the applications. But those are the kinds of things that FERC has not routinely analyzed in the past, and, to the extent that they need to and they become complex and contested, it could slow down the application process.

Mr. SYNAR. We are not talking about 4 or 5 years like we saw with gas and oil, are we?

Mr. REZENDES. Actually in gas and oil some of them went a lot longer than 4 years.

Mr. SYNAR. You also talked about purchasing new software to meet this challenge. Yet it looks like the agency will have very few

personnel to apply that task. Are these initial steps which we are seeing FERC take enough?

Mr. REZENDES. We have seen them request additional resources. Right now, I think they have 366 positions allocated to electricity. They have already asked in their 1994 budget for four—excuse me—seven additional positions over 1993, but we haven't seen these materialize yet. There are now five fewer full-time positions than there were in 1992.

Mr. SYNAR. So there is some cause for concern?

Mr. REZENDES. Yes, there is some concern.

Mr. SYNAR. Let's talk about an issue that you raised with respect to our gas pipeline hearing on the key indicator case tracking system—KICTS system—which was a good measure of performance. In your opinion, are similar changes useful in the electricity program?

Mr. REZENDES. Yes, sir.

Mr. SYNAR. What do you think those changes will do and why are they needed?

Mr. REZENDES. Mr. Feehan looks at that one pretty closely. I will let him answer that.

Mr. FEEHAN. As Mr. Rezendes said, the changes that they have made to the gas pipeline portion of their information system are in many ways similar. The idea conceptually is to track dates internally through the various review stages of their overall process, and we are suggesting that they do the same thing for electric power applications. We don't know if they have done that or not. Basically the idea is to again track internally.

Mr. SYNAR. Would that solve the problem with the incomplete applications?

Mr. FEEHAN. The problem with incomplete applications, as we found it, is that the data wasn't there to find out why they were incomplete.

They try to get these things moving through the system as quickly as possible. They make phone calls where possible to clear up where data is missing from an application, and they do that fairly quickly. And they get these things out within a couple of months. So their idea is to move these things through as quickly as possible, sometimes at the expense of retaining information which may be useful later to identify recurring problems or things that would otherwise be helpful in mitigating the numbers of incomplete applications. So it is sort of a different issue.

Mr. SYNAR. So what you are recommending is to try to get FERC to conform their electricity program to the gas program?

Mr. FEEHAN. That is right.

Mr. SYNAR. That is a good analogy.

All right. How would you encourage FERC to do settlements and increase the number of things that don't have to go to full-blown hearings?

Mr. REZENDES. I have to give them some credit. They are doing a lot of settlements already. We think there are additional opportunities, particularly under the 1990 Alternative Dispute Resolution Act which provides for mediation and various other mechanisms in dealing with this. FERC has not yet implemented regulations or es-

tablished a policy as to how to implement the 1990 act, and we think those are opportunities there.

Mr. SYNAR. Let me ask you one final question, and I will turn it over to Mr. Hastert.

You know, we learned during the oil pipeline program that FERC was into the business of second guessing voluntary settlements. Have you seen that problem with respect to electricity?

Mr. REZENDES. No, sir. I am not aware of any.

Mr. SYNAR. OK. Mr. Hastert.

Mr. HASTERT. Thank you, Mr. Chairman.

Prior to the act one of the problems was that there were States over the years or areas in several States that had excess capacity. Other areas didn't have—they were undercapacitated.

Those undercapacitated needed to get electricity from other areas, and those people with excess capacity for one reason or another needed to be able to export. And because that was a need and all of a sudden there needed to be interstate transmission—and a lot of times that there was a utility in between who probably had done its job or was right at capacity and didn't want to basically turn over its lines for this intertransmission situation.

So you have a new set, a different structure than there was under the 1932 act. One of the things that we need to ensure is that FERC has a capacity to be able to make the judgments that when IPP's come in to sell electricity or whether they are cogenerators or whatever they may be, that No. 1, they are not cherry picking the baseload so that you have folks out there who are taking on an inordinate burden. Also, we want to make sure that you don't have stranded investment.

And so you do have to have a Corps of Engineers out there that can make those decisions. You also have to have some economic analysis or analysts out there, especially on the stranded investment issue and the securities issues.

In your opinion, is FERC capable of doing that? Are they gearing up? Or wasn't that the scope of your investigation?

Mr. REZENDES. We did look at it a little. Again, the uncertainty is you don't know the volume and complexity of these applications that are going to come in.

But, as of right now, FERC is pretty well situated to deal with them. They recognize that there are going to be these additional complexities in the future, and I believe FERC is already reassessing its priorities and its staffing with the ceiling that they have, although they have requested additional positions, that they are making priorities within the current staffing to deal with what they expect to come down the road.

Mr. HASTERT. Really, in a sense, we have a whole new ball game.

Mr. REZENDES. In essence, and it is a lot of new issues that we don't know exactly how difficult those issues are going to be to resolve.

Mr. HASTERT. In your testimony you state that the effects of the EPACT on FERC's overall workload are difficult to estimate. Are you implying—and I am not trying to say—I am trying to read between the lines here that there is a possibility that FERC's workload may increase. Do you feel that FERC should move at a slower pace in implementing EPACT?

Mr. REZENDES. Oh, no. Not at all. I don't want to leave that message at all. No. Just the opposite.

Mr. HASTERT. I am glad I didn't get that opinion, but it is a question.

I notice you mentioned that IPP's can move in to an area. That makes them intrastate instead of interstate. Does that, in your opinion, change FERC's responsibility?

Mr. REZENDES. I didn't necessarily mean within just the State. It could be within the region. And, as you know, there are also regional transmission groups that FERC is trying to encourage that could do similar activities.

Mr. HASTERT. I know in my own case—my own baseload area—a generator—we have had—I think it was Duke Electricity that came in and put in an office in that area, qualified them as being a regional area. And, as a result of that, that company has really made major changes in its view of the universe and what has spun off and other issues. So there is a lot of restructuring going on out there as a result of the EPACT.

And I think it is certainly the concern of the chairman and myself that FERC is geared up, ready to go, looking to the future and being able to handle those new issues. In your opinion, although that wasn't really the scope of your investigation, is that basically where they are going?

Mr. REZENDES. Yes. As I said, we feel comfortable where they are. They recognize themselves they need to make changes and are making changes. And I am sure FERC will testify to that a little later. Whether those are adequate, I think the jury is out on that. We won't know until much later.

Mr. HASTERT. Another issue that has kind of developed in this whole thing is that electric generation is not only a State-by-State issue anymore. It is really a regional issue. It becomes even an international issue——

Mr. REZENDES. That is true.

Mr. HASTERT [continuing]. Because a lot of our areas in the Midwest and certainly up in—the gentleman from New York, his area, a lot of that power comes from another country.

Mr. REZENDES. Canada.

Mr. HASTERT. And so FERC has to look at that issue also. And do you think they are prepared to start to work through those types of international issues?

Mr. REZENDES. We see no additional staff or expertise that they would need to do that other than what they already have.

Mr. HASTERT. And, also, I wrote the Public Utility Act in Illinois, and I know that the parameters that State commissions need to have and need to operate.

But the playing field has changed, too, and I know that there are vestiges of those State commissions reaching out and saying, jeez, we are losing this power. We want to keep it. And in some sense in competition with FERC. And I think we have heard that talked about today. Do you think that is going to hinder FERC's ability to effectively administer this law?

Mr. REZENDES. I really don't have a view on that. I am sure FERC will a little later, since they are more into the legalistic aspects with the interface which the State will play out. My gut reac-

tion is we don't see a conflict right now. That doesn't mean some sharp attorney or association someplace won't find a way to do that.

Mr. HASTERT. Thank you very much.

Mr. SYNAR. Mr. McHugh for 5 minutes.

Mr. MCHUGH. Thank you, Mr. Chairman.

Mr. Rezendes, one of your recommendations was that you encouraged FERC to adopt alternative settlement procedures which are signed, and your testimony alluded to ultimately mandated by 1995 under the Administrative Dispute Resolution Act.

In your looking at that particular lack of policy, was there any indication from FERC that that process of adoption has at least begun, or did you determine it didn't exist?

Mr. REZENDES. We think it has begun. I think they haven't resolved exactly how best to implement it under the various kinds of applications they are confronted with, not only electricity but hydro and gas. I think the other areas may be more complex than what you are seeing. But I am sure FERC will have something to say about that.

Mr. MCHUGH. I was interested in how they represented it to you or what you found. We will certainly ask them about that as well.

I have no further questions. I yield back, Mr. Chairman.

Mr. SYNAR. Mr. Mica.

Mr. MICA. I want to thank Mr. McHugh for the wisdom and insight in asking that question, because that was the same damn question I was going to ask.

Just one final thing and we won't beat the horse anymore. In your examination of all this, do they have enough personnel or equipment or are they all sitting around drinking coffee and smoking cigarettes?

Mr. REZENDES. That is a great question. No one has ever asked me one like that before. It is a small place. They cover a lot of applications. I think everybody is productively employed. Whether everybody is carrying their fair share, I can't attest to that. But I think their track record in moving applications with 6 percent in less than 6 months means someone over there is doing something.

Mr. MICA. And they have the equipment, too?

Mr. REZENDES. Yes.

Mr. MICA. Thank you, sir.

Mr. SYNAR. Ms. Pryce.

Ms. PRYCE. I would just like to commend you for your ADR efforts. I am a former judge and I understand the complexities of litigation and the expense and time. I don't have any questions, but continue on that track. It is best for all involved, on almost any issue.

Mr. SYNAR. Mr. Russell, the SEC and not FERC or the States makes the decisions regarding the reasonableness of nonpower transactions such as fuel purchases between the utility and the affiliates. What is wrong with that?

Mr. RUSSELL. With FERC reviewing affiliate transactions?

Mr. SYNAR. Right.

Mr. RUSSELL. If they get into the transactions themselves and see what is happening and what is behind those transactions, what happens when affiliate interlocking directorates make rec-

ommendations, ensuring those transactions are at arms length? There is nothing wrong with that.

Mr. SYNAR. Sometimes it may not be an arm's-length transaction?

Mr. RUSSELL. Very much so.

Mr. SYNAR. And consumers would pay too much, then?

Mr. RUSSELL. That is correct.

Mr. SYNAR. Is it true that in the last 20 years the SEC has rarely if ever issued an order prohibiting a registered holding company from taking a particular action based on consumer protection—unlike FERC, which looks at whether transactions are just and reasonable?

Mr. RUSSELL. Yes.

Mr. SYNAR. Do you think it makes sense to have a holding company regulated by FERC for some transactions like mergers but not for others like the affiliate transactions?

Mr. RUSSELL. I believe that those types of transactions that would have economic impact and result in cost and rates should be done by somebody in some organization——

Mr. SYNAR. Should it be consolidated?

Mr. RUSSELL. If an organization has the correct tools to do the evaluation, if it doesn't—regardless of who does it, it doesn't make any difference.

Mr. SYNAR. What is NARUC's position on that?

Mr. RUSSELL. That some organization like the FERC should review those types of transactions, because they have the economic background and staffing and resources to do the types of cost-based analysis that is required to assure that the transactions are in fact at arm's length.

Mr. SYNAR. Do we need a legislative fix or can this be done administratively?

Mr. RUSSELL. I am not sure if it can be done administratively, but if there is a desire by an administrative organization with the necessary resources, it could possibly be done. I am not sure whether or not that is doable or if that is an impediment. But what we recognize is that there is a conflict between having one organization do something not necessarily economic and the other doing economics.

Mr. SYNAR. In your testimony you discuss the gap left and the regulation of multi-State registered holding companies such as in the Mississippi Power & Light case. You propose filling that with voluntary regional compacts. Do you see that concept being extended maybe into other areas other than what you recommend?

Mr. RUSSELL. It could be—regional compacts could extend into things like the regional transmission groups, it could extend also into integrated resource planning, into a number of multidisciplinary, multijurisdictional issues where States may come together or must come together in order to make recommendations to a FERC-type body.

Mr. SYNAR. What would keep or stop utilities from taking advantage of the post-Mississippi Power & Light preemption of State jurisdiction by—let's say, for example, forming various types of interstate affiliates to escape stricter State review?

Mr. RUSSELL. There is nothing to prohibit that right at this point.

Mr. SYNAR. So without legislation dealing with the two holding company issues that I just mentioned, State commissions do have that opportunity?

Mr. RUSSELL. That gap needs to be filled. If it requires legislation, then that should be it. If it requires redirecting resource, that should be it.

Mr. SYNAR. I am very appreciative of the support NARUC has shown for the RTG concept, which I pushed for in last year's consideration of EPACT.

What is NARUC's view on the best way to get the State's input into the RTG process?

Mr. RUSSELL. We believe that there are regional concerns and regional problems that can best be solved by regional affiliations. It is our opinion that on an RTG, if State commissions have access or have a seat at the table of an RTG, and that RTG is comprised of all of the interested parties in a particular transaction and representative of all the parties in a particular transaction, and the States have the ability to have a seat but not be bound by those types of agreements because the States may need to be performing some type of adjudication responsibility in that dilemma, if we are at—if we have a seat there, then I think States would be able to compose a solution to a regional problem.

It is no better than States having an attempt to settle a State and a local concern before the Federal Government steps in.

Mr. SYNAR. In light of the trend that most States have toward some kind of form of bidding for new capacity, does the special status of PURPA qualifying facilities still play a role in this?

The question I guess I am trying to get to is, should there be just one class of independent power producers playing with the same rules as everyone else, or not?

Mr. RUSSELL. The law of PURPA requires that utilities must purchase any capacity if there is a need and a qualifying facility comes to the door. That is the only provision for those types of organizations that requires a utility to make a purchase. All the other types of purchases are optional at the behest of a utility.

The PURPA proceedings, though, have in places where they have been implemented set particular prices. They avoided costs of the next generation need that the utility would have. That avoided cost benchmark is a starting point in finding out whether or not it is a benefit for some other entity, a nonutility generator, be it a QF, IPP, or some other area, to set a price, a floor, that says whether or not a utility should build or somebody else should do it.

Customers and ratepayers should be indifferent to whoever that individual is. It is questionable now whether or not that in fact is true, when in fact they may have some affiliate transactions in place, whether or not there are some registered holding companies in place. But bidding itself as a mechanism to determine price, a mechanism to determine who should be providing that service, is a useful tool that State commissions are using and using more readily today.

Mr. SYNAR. You made in your comments a number of outlines of principal areas where regulations needed to be coordinated be-

tween FERC and the States. I thought they were pretty helpful. How have those suggestions been received by FERC?

Mr. RUSSELL. To date they have been received very well. Again, we have been trying over the last few years to get audiences with the FERC. There have been some concerns about whether or not the sunshine laws and other types of Open Meeting Act requirements inhibit the discussion between States and the FERC. And with this new administration, that has come down, there has been expressed willingness to sit down and meet.

It has been remembered that the States, like the FERC, are not special interests, but we are the public interests. In order to solve the types of policy decisions that are going to be required to come out of the Energy Policy Act, it is going to be best served if those two regulators, State and Federal, are able to sit down together.

Mr. SYNAR. Let's talk about sitting down together. You mentioned the joint boards.

Mr. RUSSELL. Correct.

Mr. SYNAR. Can those be established under existing law such as the Federal Power Act?

Mr. RUSSELL. They can, but the problem is those joint boards, when they are dealt with on generic bases, must be represented by all of the 50 States. That, in fact, is an unwieldy situation.

What we are suggesting is that those be whittled down to regional issues and regional individuals, which could be ad hoc, because they could change depending on the region, depending on the players, depending on the issue. But that type of regional regulation is something that needs to be discussed with the FERC.

They have expressed to date a willingness to do that, to sit down and try to design a process that allows for the conflicts of jurisdictional issues.

Mr. SYNAR. What would their legal status and authority be?

Mr. RUSSELL. The compacts?

Mr. SYNAR. The boards.

Mr. RUSSELL. They would be almost like a separate level of government. But it would only be advisory. It is similar to the joint board process that is being used in telecommunications, where States have the ability to sit down with the industry and make recommendations to the FCC.

Here the analogy would be that the joint board would be something like an administrative law judge who makes recommendations to the FERC, who has the ultimate responsibility if there is an indecisiveness or a conflict from the decision.

Mr. SYNAR. Thank you, Mr. Russell.

Any other questions of the panel?

Mr. HASTERT. Thank you, Mr. Chairman.

One of the thought processes, I think, in the EPACT act that we passed last year, was to all of a sudden realize that there is actual competition out there. There are ways that the industry has changed certainly there is a transmission industry and there is a generation industry that has begun to develop, especially with the issue of PURPA over the years, the development of IPP's and cogeneration. And it was the work to get to the transmission lines so that you can move.

That is like having factories without highways. You can build, but you can't get your product to the consumer. You don't have that competition, which bothers me, Mr. Russell, in a sense it is counter to the purpose of State commissions because State commissions regulate monopolies.

When monopolies cease to exist, all of a sudden States and State commissions see their jurisdiction disappearing. And there is probably a debate that will go on, whether all these issues can be covered under competition and should not be regulated, or that regulation should be there to oversee everything.

What is your view on that? Put your Michigan hat on.

Mr. RUSSELL. It is true that the economic dynamics from competition, almost competition, and monopoly services is in conflict. The maximization of profits for dividend payments by utilities, IOU's and IP's, is definitely going in a different direction than State commissions who regulate the distribution side of the equation, and they are trying to minimize rates.

That doesn't mean that "profit" is a bad word. State commissions have always been willing to give profits to utilities who have operated in a prudent and efficient manner. In fact, we have tried to address our regulations through incentive types of mechanisms and other types of profitsharing mechanisms.

It is true that because of these dynamics of competition and almost competition, that things will have to change.

Mr. HASTERT. Quasi-competition.

Mr. RUSSELL. And we, the States, in particular Michigan, are willing to sit down with all of the players and try to come up with a consensus. As you may know, Michigan was very instrumental in trying to put together a consensus package that dealt with transmission issues of the Energy Policy Act when transmission was not considered to be part of the discussions.

We came together—even though we had different utilities that were 180 degrees apart in their philosophy, corporate philosophy, we will manage to come together with a consensus.

What we would offer to the FERC and to the Congress is an attempt to do just that, for all of these other types of dilemmas that will surface that have been alluded to by the GAO that is going to affect all the numbers you see on the board.

Mr. HASTERT. I seem to recall there was a utility mogul who once said that regulation only takes the place of competition. Of course, he was proregulation, and used it to his best advantage.

So I would hope that the spirit of the EPACT, which said, let's move to competition where we can have competition, let's let the marketplace begin to set those rates, let the highways deliver the least-cost product to the consumer, and still there are other things we have to look at.

And I would hope that FERC, especially when you get into the interstate issues on this, that we have to protect baseload and look at stranded investment and all those other issues that are out there.

And I guess for my final question, Mr. Rezendes, do you think they are equipped to do that? I asked that in another way before, but I think that is kind of the bottom line.

Mr. REZENDES. It is really hard to say. I don't want to give you just a nonanswer here. I don't think we know exactly the problems we are going to encounter when we go down this new road.

We see a lot of opportunities. And hopefully these opportunities will come to fruition and make electricity cheaper for the consumer and streamline the entire regulatory process, which I think we would all like to have. I don't know if any one of us can say we have a high level of assurance that we have all the pieces in place to make that happen.

Mr. HASTERT. With your indulgence, let me ask one more question. We are talking about regional compacts. Do you think the regional compacts, let's say the Great Lakes regional compact, for instance, would negate or fix competition opportunities and move the product or electric transmission through those types of compact?

Have they become so regionally tight, in your opinion, that it would disallow other types of competition from outside?

Mr. REZENDES. I don't know. I really don't have a view on that.

Mr. RUSSELL. I don't believe so. I don't believe the regional compact or having regions get together at the table to decide regional issues prohibits any other types of competition or entrance into the marketplace. In fact, I would go so far as to say it would encourage that, because the monopoly situations that exist now with the particular transmission owners historically have been at the whim of those particular owners.

Now you have got these other new players who have to go through this monopoly, through this highway, as you put it, and pay a toll. The question then becomes, what is going to be the price and who is going to determine what that toll is, and should all of the regulations be associated, would that be fair?

Mr. HASTERT. That is not a duplicate system. It is probably owned by one company and they do have that monopoly. So that part of the business has to be looked at very toughly, I think.

Thank you.

Mr. SYNAR. Thank you. I appreciate the testimony. It has been very helpful on our final hearing with respect to the FERC on these issues. I thank you all for your excellent work.

Our next panel is Mark Sholander, general counsel, Kansas City Power and Light, on behalf of EEI; Robert McDiarmid; and Jeanine Hull, vice president, Environmental and Regulatory Affairs, LG&E Power Systems, Inc., on behalf of the Electric Generation Association, and Robert O'Neil.

[Witnesses sworn.]

Mr. SYNAR. Thank you very much. Welcome.

Why don't we begin with you, Mr. Sholander. Your entire testimony will be made part of the record. I am going to keep you to a pretty strict 5 minutes, so please try and summarize.

STATEMENT OF MARK SHOLANDER, GENERAL COUNSEL, KANSAS CITY POWER AND LIGHT CO., ON BEHALF OF EDISON ELECTRIC INSTITUTE

Mr. SHOLANDER. Thank you.

Mr. Chairman and members of the subcommittee, my name is Mark Sholander and I am general counsel of the Kansas City Power and Light Co. I am testifying here today on behalf of the

Edison Electric Institute, which is the association of the Nation's investor-owned electric utility industry.

An almost entirely new Commission has recently been constituted along with the new Chair, Elizabeth Moler. We are pleased they have strong backgrounds and interest in electricity issues. This Commission is already making great strides dealing with the key issues affecting the electric utility industry, including implementation of the Energy Policy Act.

We are particularly pleased that the Commission recently initiated a public inquiry on transmission pricing. Transmission pricing has been one of our major concerns.

FERC's existing policy was developed in the context of the Northeast Utilities merger case without broad public input. FERC's recent notice of inquiry indicates, however, that the Commission has an open mind about potential changes to its policy and gives all interested parties the opportunity to address this important issue.

While this issue—while this proceeding is pending, we also encourage the Commission to consider alternative pricing proposals submitted in individual cases.

The Commission is well along in implementing other important requirements of the Energy Policy Act. It recently issued a policy statement on what constitutes a good-faith request for transmission service. We are pleased that this statement indicates that a request for transmission service must provide sufficient information for a transmitting utility to determine the effects of the proposed transaction.

The Commission also recently received comments on a proposal to collect information to inform the public on potentially available transmission capacity and known constraints. While we have concerns about some of the data requested, we believe FERC is seeking the right kind of data to allow potential users of the transmission system to conduct an initial screen of potentially available capacity. Of course, the initial screening allowed by this data must be supplemented with a specific request for service so that service-specific engineering studies can be performed.

The Commission also just last week issued a policy statement intended to encourage the development of regional transmission groups. These are referred to as RTG's. The statement provides considerable flexibility for RTG's to reflect their individual circumstances and needs.

In addition, it has successfully completed a rulemaking to define the qualification criteria for exempt wholesale generators, or EWG's. We hope these proceedings will go a long way toward promoting informed, efficient, voluntary agreements for transmission services.

I would like to conclude by commenting on a few other issues involving FERC electricity regulation. FERC has the primary responsibility to ensure that prices utilities pay qualifying facilities, or QF's, under the Public Utility Regulatory Policies Act, or PURPA, do not exceed avoided cost. Unfortunately, in several States utilities are forced to purchase from QF's at rates that exceed their own costs or the cost of purchasing power from others.

One Oklahoma utility, for example, estimates that its customers will pay $1 billion in excessive rates by 1999 solely because the

State commission set avoided cost levels too high. Over 6 years ago, Orange and Rockland utilities filed for relief from the most obvious cause of such overpayments, which was a State law then in effect which set minimum payments for QF's above avoided costs.

Although the FERC initially ruled in the utility's favor, it stayed the effect of that decision, issued a supplemental rule, and has not yet issued a final decision. In other words, it has left this issue hanging. This issue is still very important, and a Connecticut utility has asked for essentially the same relief in a case filed with the FERC earlier this month.

Second, we urge the FERC to approve market-based rates in workably competitive markets using the approach recommended by the Department of Justice Antitrust Division and applied under the antitrust laws. Under that approach, market-based rates should be allowed when a purchaser of bulk power has sufficient alternative competitive options to the transaction which it selected.

Market-based rates should also be allowed in competitive bidding situations or when State commission involvement indicates an environment in which market power cannot be exercised.

FERC should also encourage all agreements negotiated at arm's length among unrelated parties when no objections are raised. And in the last few years, there has been an increasing tendency for the FERC to step in where these voluntary arrangements have been filed with the FERC to set policy, and that has led to some of the delays in those voluntary arrangements that were discussed earlier in these proceedings.

Third, we believe that informal collaborative processes between the FERC, State regulators, and regulated utilities as appropriate can lead to greater levels of certainty and clarity in the regulatory process. We agree with the decision made during consideration of the Energy Policy Act not to address regional regulation of multi-State holding companies.

Such regulation would add an additional layer of unnecessary regulation for those companies. For the same reasons, we believe that the Securities and Exchange Commission should continue to have authority over intraholding company affiliate transactions. We are talking about the nonpower supply transactions in that regard. Finally, we believe that some of the procedures under which FERC operates can be simplified. You will see in my testimony where our major concern in that area is the use of the deficiency orders of late.

And in conclusion, the new Commission and its new Chair have hit the ground running on electricity issues. They have many important decisions to make to achieve the Energy Policy Act's goal of reliable, competitive, and efficient power markets. Judging by their efforts to date, this Commission has demonstrated considerable knowledge and initiative, a willingness to obtain input from all affected interests, a commitment to solve problems placed before it, and an open mind.

We would like to commend the Commission and its Chair for a fine start. We look forward to working with the Commission on these matters in the future.

Thank you.

[The prepared statement of Mr. Sholander follows:]

HEARING ON
ELECTRICITY REGULATION BY THE
FEDERAL ENERGY REGULATORY COMMISSION

BEFORE THE
SUBCOMMITTEE ON ENVIRONMENT, ENERGY AND NATURAL RESOURCES
COMMITTEE ON GOVERNMENT OPERATIONS
UNITED STATES HOUSE OF REPRESENTATIVES

TESTIMONY OF
MARK SHOLANDER
GENERAL COUNSEL
KANSAS CITY POWER AND LIGHT COMPANY

ON BEHALF OF
EDISON ELECTRIC INSTITUTE

AUGUST 6, 1993

I. Introduction

My name is Mark Sholander and I am General Counsel of the Kansas City Power and Light Company, an investor-owned utility serving parts of Western Missouri and Eastern Kansas. I am testifying today on behalf of the Edison Electric Institute (EEI), the association of the nation's investor-owned electric utility industry. EEI's members serve 76 percent of all ultimate consumers and generate 78 percent of all electricity produced in the United States.

I thank the Committee for the opportunity to testify before you today on the important and timely issue of electricity regulation by the Federal Energy Regulatory Commission (FERC).

I would like to start out by saying that an almost entirely new Commission has recently been constituted, along with the appointment by the President of a new Chair, Elizabeth Moler. This newly constituted Commission is already making great strides in dealing with some of the key issues affecting the electric utility industry, and in particular, issues related to implementation of the Energy Policy Act (P.L. 102-486).

Transmission pricing and access are critically important to satisfying the regulatory objectives of the Energy Policy Act, and to ensuring that the Act's goals of fostering reliable, competitive, and efficient bulk power markets are achieved. We are particularly pleased that the Commission recently initiated a public inquiry on its transmission pricing regulatory policies. The Commission's existing transmission pricing policy has been one of our major concerns for the past year. FERC's existing transmission pricing policy was established in the Northeast Utilities/Public Service of New Hampshire merger case without broad public input and has been consistently applied in subsequent cases.[1]

The recently issued Notice of Technical Conference and Request for Comments (Docket No. RM93-19-000) gives all interested parties an opportunity to express their views and concerns on transmission pricing. While the Commission has made no promises that it will change existing policy, it is clear that it will have an open mind towards potential changes to its policies. We are greatly appreciative that the Commission has taken this action. However, while this generic proceeding is pending, we hope the Commission also will consider alternative pricing proposals submitted in individual cases. Case-by-case analysis and generic proceedings

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[1]See e.g., Pennsylvania Electric Company, 58 FERC ¶ 61,278 (1992); Pennsylvania Electric Company, Order Denying Rehearing, 60 FERC ¶ 61,113 (1992).

each have an important role in informing the Commission about the practical effects of new approaches.

The Commission also recently issued a Policy Statement on what constitutes a "good faith" request for transmission services and a "good faith" response by the transmitting utility under Sections 211 and 213(a) of the Federal Power Act. This statement helps clarify the obligation of applicants for transmission service to provide sufficient information to allow transmission owning utilities to determine available capacity and constraints affecting their ability to provide the requested service. Thus, it should help promote the efficient negotiation of voluntary agreements. We do have concerns, however, about the sufficiency of information which may be provided with requests for "network service."

The Commission is already well along on other Energy Policy Act implementation requirements. It has completed--well in advance of its statutory deadline--work on a rule to define qualification criteria for exempt wholesale generators (EWGs). We believe the Commission successfully balanced the interests of many parties and satisfied the intent of Congress to place FERC in a ministerial role with respect to EWG certification. We believe the final rule is workable, and we commend the Commission for its timely issuance of final rules.

The Commission is considering comments in a proceeding required by Section 213(b) of the Energy Policy Act. This section requires the Commission to issue rules within one year to delineate the information it will collect to inform the public on potentially available transmission capacity and known constraints. I think the generally excellent job done by the Commission in its proposed rule is borne out by the comments filed by all sides of the transmission debate. While we have concerns about the divulgence of competitive, sensitive system lambda information, we believe that in general the Commission is seeking the right kind of data to allow potential users of the transmission system to do an initial screening of potentially available transmission capacity.

On July 30, the Commission issued a Policy Statement on the formation of regional transmission groups (RTGs), an issue on which the Chairman of this Subcommittee was directly involved in the Energy Policy Act debate. EEI fully supports the formation of RTGs and helped to develop the consensus RTG agreement which, due to the timing involved, was not incorporated into the final comprehensive energy bill.

We were pleased that former Chairman Martin Allday initiated a proceeding to determine, among other things, whether or not FERC could implement the consensus proposal absent specific statutory authority. EEI's comments in this proceeding are appended to this testimony.

In its Policy Statement on RTGs, FERC encouraged the development of RTGs and suggested that RTGs meeting certain characteristics, including open and full participation by buyers and sellers (and state commissions), fair decision-making and dispute resolution processes, and a commitment to provide transmission access, among others, would be given deference by the Commission. The Commission suggested that it was issuing a Policy Statement as opposed to formal rules because it wanted to allow maximum flexibility (within minimum criteria) for RTGs to form according to the needs of utilities and state commissions.

We wholeheartedly concur with the approach the Commission has taken in issuing a Policy Statement as opposed to a detailed rule. While we are still analyzing the statement, our initial reaction is that the Commission has struck an appropriate balance between the need for flexibility so regions can meet local conditions in forming an RTG and the need for some certainty about the criteria which must be satisfied for a group to be given deference by the Commission. Many of EEI's member companies are currently involved in negotiations to form RTGs, while others are still thinking about the issue. The Commission's statement that it plans to give deference to such groups should help allay some concerns that RTGs would simply result in an additional layer of regulation, and thus should further the goal we all share in ensuring efficient and reliable implementation of the Energy Policy Act, through voluntary processes wherever possible.

The new Commission has hit the ground running and is placing an increasing emphasis on electricity issues, which we believe is entirely appropriate given the Commission's critical role in future power supply and regulation. We are pleased that the new Commissioners and new Chair have strong backgrounds and interests in electricity issues. We are also particularly pleased with the Commission's expressed desire to develop a clear regulatory framework regarding EWGs, transmission access, transmission pricing, and other EPACT implementation issues. While this framework will take time to develop, the Commission clearly intends to provide much needed consistency and predictability for both buyers and sellers of bulk power and transmission services.

While the Commission has already begun to address all of the EPACT implementation issues that are mandatory under the statute, Chair Moler has also indicated a desire to address related issues critical to achieving the goals of the Energy Policy Act. These issues include the appropriate terms and conditions for transmission service, what constitutes transmission service subject to a FERC order under the Act, and stranded investment issues and problems. We look forward to working with the FERC on these matters.

I would like to discuss several other issue areas which are critical from our perspective to the efficient functioning of

wholesale power markets. These issues, however, were not directly addressed in the final version of last fall's energy legislation. These issues include:

- Proper Implementation by FERC and the States of the Public Utility Regulatory Policies Act (PURPA)
- FERC's Definition of "Market Power" and its Application and Implications
- Federal/State Jurisdictional Issues
- Procedural Issues Concerning Various Filings at FERC

Each of these issues is addressed in turn below.

II. Proper Implementation of PURPA

STATEMENT OF THE PROBLEM

The Commission's review of major issues affecting the electric utility industry should include the excessive costs imposed upon utilities and their customers by the states' improper implementation of PURPA. Section 210 of PURPA requires utilities to purchase electricity from Qualifying Facilities (QFs) at rates which are just and reasonable and do not exceed avoided cost. FERC has primary responsibility to ensure that pricing practices under PURPA are not excessive. When utilities are forced to pay administratively set prices which exceed real avoided cost, the bulk power market is not operating efficiently; competition is distorted; least-cost plans are disrupted; and utility customers pay higher rates than they should.

In several states utilities and their customers are forced to purchase from QFs at rates that exceed what would be an accurately determined avoided cost. The problem occurs in several guises. First, some states have imposed a minimum rate which requires a utility to pay QFs more than the utility's avoided cost. Until recently, for example, New York State required utilities to pay a minimum of six cents per kilowatt hour, which exceeds the avoided cost of electricity in that state. Connecticut still requires some purchases from QFs above avoided costs.

Second, some states require utilities and their customers to pay QFs at a rate equal to the cost of building new capacity even when they have no need for additional capacity. In addition, QF payments in some states are based upon a fixed estimate of long-run avoided energy costs. These estimates of energy costs, which are based primarily on hard-to-predict future fuel prices, are likely to be in error.[2] For example, QFs will reap a windfall benefit

[2]FERC has recognized that "there is little doubt that fixed-price contracts, especially long-term fixed-price contracts, can cause severe inequities and inefficiencies." Administrative

when the estimates are higher than actual costs, but they may not sell to utilities when the estimates are below actual avoided costs. The long-term effect is that whenever energy rates are based on estimated avoided costs, a utility will pay more than actual avoided energy costs. Ideally, avoided energy costs should be calculated on a real time basis to reflect actual avoided costs.

Another way that QF purchase rates can be distorted is when the capacity rate is based on a proxy unit that does not match the lowest cost alternative available to the utility. For example, in Maine the Public Utility Commission (PUC) required that purchase rates be based on estimated Seabrook Nuclear Unit I costs and specific cost escalation factors. The PUC also refused to allow the reopening of such contract rates if circumstances changed in the future. As a result of such QF purchases, some Maine utility rates to consumers are up to 15 percent higher than they should be had true avoided costs been reflected. These excessive costs are imposed directly on consumers in violation of the avoided cost ceiling established by PURPA.

It is not just and reasonable for a state commission to require a utility or its customers to pay more than its real avoided costs. EEI urges FERC to require states that use administrative determinations of avoided costs for QF purchases to assure that such determinations reflect the lowest cost alternative available to that utility.

A state requirement that utilities pay QFs more than avoided cost was first contested in a Declaratory Order which Orange and Rockland Utilities Company filed with FERC on July 31, 1987--over six years ago. On April 14, 1988, the Commission granted Orange and Rockland's request and found that states could no longer allow rates above avoided costs. But the Commission almost immediately

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Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnections Facilities, Docket RM88-6-000, FERC Statutes and Regulations, Proposed Regulations ¶32,457 at 32,173 (1988).

This is especially true for energy-only contracts. FERC stated that:

> Efficiency problems are especially likely when a long-term contract attempts to predict future fuel prices. Relative fuel prices have been especially volatile in the last few years. The potential for rapid and significant change in relative fuel prices in the presence of fixed-price contracts suggests that possibility of problems in the electric utility industry similar to the take-or-pay problems that developed in the natural gas industry. (Ibid. at 32,172)

stayed that decision and issued a supplemental rule to obtain comments from all interested parties.[3] Attempts to appeal the 1988 decision were rejected as untimely by the U.S. Court of Appeals for the Second Circuit because the supplemental rulemaking was pending before the Commission.[4] Many utilities submitted comments indicating that they were being forced to pay QFs rates above their true avoided cost and pointing out that this would impose excessive rates upon their customers. However, the Commission has not resolved the Orange and Rockland case or the supplemental rulemaking.

POTENTIAL REMEDIES

Excessive payments to QFs impose an enormous cost on many utilities. Utilities in New York, New England and elsewhere experience such problems. Many are paying large sums to buy out or buy down QF contracts which are priced above avoided cost in order to save their customers hundreds of millions of dollars.

In this case, justice delayed has truly proven to be justice denied. Connecticut Light and Power Company recently asked the Commission to resolve the same legal issue raised in the Orange and Rockland case. EEI urges the new Commission to give the same expeditious attention to this issue that it is giving to other important electricity matters.

In an important related issue, FERC has recently decided that the Energy Policy Act requires the provision of wheeling services to QFs under the same terms and conditions as all other potential transmission system users.

EEI disagrees with this interpretation of the Energy Policy Act, and urges FERC to reconsider whether it is in the public interest to grant mandatory transmission services to QFs which seek to sell power to an unwilling purchaser at rates which exceed avoided cost. Mandatory wheeling exacerbates the problems of forcing a utility to pay more than avoided cost for QF power because it allows more QFs to take advantage of excessive prices. This prevents utilities from using lower cost electricity, distorts competition and improperly increases costs to end-user customers. Under Section 211 of the Federal Power Act, FERC must find that a mandatory wheeling order is in the public interest. We firmly believe that, under the Energy Policy Act, the Commission can and should find that it is not in the public interest to use mandatory wheeling to

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[3] Orange and Rockland Utilities Co., 43 FERC ¶61,067, stay issued, 41 FERC ¶61,547, supplemental rulemaking issued FERC Statutes and Regulations ¶32,462 (June 16, 1988) RM-88-6.

[4] Occidental Chemical Corp. v. FERC, (C.A. 2, Civ. No. 551) (February 22, 1988).

conduct transactions which violate PURPA's avoided cost ceiling and thereby improperly raise rates to end-use customers.

III. The Definition of "Market Power" and its Implications

An increasingly important aspect of FERC's regulatory approach is its approval of market-based rates for sellers of electricity in competitive markets. The rise of exempt wholesale generators under the Energy Policy Act will lead to an increase in bulk power transactions at market-based rates.

In perfectly competitive markets, prices are set according to what the market will bear. No single seller in a competitive market can significantly influence the price paid by the buyers of that seller's particular product, and therefore the government has no need to regulate the sales price. However, the situation is not the same where a monopoly exists. In such cases, economists suggest that the monopolist can exert "market power," in that it has the potential to significantly influence the price paid by the buyer for sales of the monopolist's product, and thus there is a government role in regulating such prices.

The situation becomes even more complicated in markets which are becoming increasingly competitive, such as the market for sales of bulk power at wholesale between utilities. In such cases, FERC determines whether or not a seller can exercise market power (i.e., control the price of its product paid by the buyer), before determining whether or not sales made at market-based prices are just and reasonable under the Federal Power Act. If FERC determines that a seller has market power, its policy has been to require power sales at traditional embedded cost-based prices.

FERC has established a three-part test, which includes examination of market power in generation, transmission, and other potential barriers to entry by competitors. With respect to the transmission portion of this test, FERC has assumed that if an entity owns transmission, it has the capability to exercise market power. As a result, the Commission has denied market-based rates for any utility or utility affiliate where the utility has not filed an open-access transmission tariff prior to proposing the sale.

The practical result has been that FERC has denied market-based rates, even where markets for the sale of power have been extremely competitive, and even where state commissions with authority over the purchaser have approved the transaction.[5] While many of these transactions were ultimately approved on a cost-of-service basis, the insistence by FERC on the filing of an open-access tariff, even in the face of extremely competitive markets for bulk power sales,

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[5]See Nevada Sun Peak, 54 FERC ¶61,274 (1991) and TECO Power Services, 52 FERC ¶61,191 (1990).

has placed transmission-owning utilities at a distinct disadvantage in those competitive markets.

Economists and the antitrust courts have used a different test to determine the existence of market power, relying on whether or not a market is "workably competitive."[6] Whether a market is workably competitive has traditionally been determined by examining the alternatives available to the buyer, thus providing assurance that no single seller has exerted market power over the transaction.

The Antitrust Division of the Department of Justice has suggested, and we concur, that FERC develop a "market screen" for bulk power transactions, focusing on whether the market is workably competitive, again by evaluating the purchaser's alternatives.[7] Such a market screen would go a long way to ensuring that electric utilities have equal opportunities to participate in competitive markets, while at the same time ensuring that those utilities are unable to exercise undue market influence.

In the cases noted above, FERC initially denied transactions which had been thoroughly reviewed by the affected state commissions and approved as being in the best interest of customers. We believe FERC can, and should, give deference to transactions that result from state planning and resource approval processes and that have been approved by state commissions.

We recognize that FERC has its own statutory responsibility to regulate bulk power transactions and cannot give total deference to state determinations. However, the Commission can give appropriate consideration to state commission involvement in determining whether the transaction took place in a workably competitive context.

IV. Federal/State Jurisdictional Issues

There are long-standing jurisdictional issues between federal and state regulators. The Energy Policy Act set in motion some very fundamental changes in the electric utility industry. How far these changes go and how quickly they occur, however, will be determined to a significant degree through the deliberations and decisions of the state commissions and FERC. We are, therefore, at a crucial juncture where collaboration and not confrontation between the two is extremely important to assuring the continuing

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[6] See Harris, Barry C. and Frankena, Mark W., "FERC's Acceptance of Market-based Pricing: An Antitrust Analysis," The Electricity Journal, Volume 5, Number 5, June 1992.

[7] See United Illuminating Co., Request for Rehearing by the U.S. Department of Justice in Docket No. ER92-397-000, July 31, 1992.

adequacy and reliability of electric service for the Nation. We support and encourage informal collaborative processes which allow state regulators to work together with federal regulators, as well as regulated utilities, as appropriate. We are confident that collaborative efforts by the regulatory community can lead to greater levels of certainty and clarity in the regulatory process. This, in turn, will lead to better service and lower costs to our customers.

Following up on this theme, I would like to address two specific jurisdictional issues. During consideration of the Energy Policy Act, some argued that much of the dissension over current state/federal relationships could be solved by the adoption of a regional integrated resource planning regime for multi-state holding companies. In the end, however, Congress chose not to address this issue and we agree with that decision. Given the great variations among the industry and market characteristics of the different holding company regions, and the structure and operations of those systems, we are concerned that national legislation could not be flexible enough to accommodate these variations. This would add an additional layer of unnecessary regulation for the multi-state holding companies and decrease their flexibility to alter plans and operations to meet changing market conditions. Such changes in the regulatory regime would undermine predictability and create uncertainty in financial markets--uncertainty which is expensive to ratepayers, investors and the economy.

Second, the Ohio Power Co. v. FERC case[8] concluded that the Securities and Exchange Commission (SEC) should determine the cost of non-power supply transactions among affiliates of a registered holding company and FERC must follow that decision. Giving FERC authority over non-power supply transactions among affiliates of registered holding companies, as has been proposed in the Senate, would impose unfair regulations on one portion of the industry. This proposed shift in regulatory jurisdiction shares many of the same problems as proposals for regional regulation of multi-state holding companies. This proposal puts the registered holding companies at a competitive disadvantage by imposing on them more complexity and uncertainty rather than less. Such changes and jurisdictional layering raise the distinct possibility that legitimate costs incurred by the holding company and approved for recovery by the SEC may become "trapped costs" through subsequent action by FERC. Ultimately, these costs may never be recovered by the companies. We believe the benefits of this proposal have not been demonstrated to outweigh the costs. Accordingly, we do not believe that a change in the authority to regulate the rates for non-power affiliate transactions is necessary or required.

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[8] 954 F.2d 779 (D.C. Cir. 1992).

V. Procedural Issues at FERC

Over the past few years, there were several noticeable changes in a number of important procedures the Commission and its staff use to conduct their regulatory responsibilities. While many of these changes are intended to promote efficient administration of the Federal Power Act and/or reflect new and emerging policy decisions, some cause substantial concern to regulated electric utilities.

CENTRAL MAINE

In an order issued on August 2, 1991, to the Central Maine Power Company, the Commission announced a new policy intended to assure that rates for all jurisdictional services are filed with the Commission in a timely manner.[9] Shortly thereafter, the Commission modified its application of statutory language allowing a waiver for "good cause" of the requirement that rates be filed 60 days in advance of when they go into effect.[10]

These decisions imposed extensive search and filing obligations and caused considerable confusion and uncertainty. One reason is that the scope of transactions covered by the Central Maine policy was not clear. This was particularly true for transactions involving the construction of facilities, rather than the sale of electricity.

Utilities have submitted hundreds of transactions in responding to Central Maine--virtually all of which involved voluntary agreements which were and remain uncontested. This effort has imposed enormous administrative burdens on utilities seeking to identify transactions going back to the 1930s. It has been particularly difficult to obtain information about transactions which were not clearly considered to be jurisdictional at the time they were entered into. The Commission's staff must be devoting considerable time and attention to these issues as well.

Once EEI and others articulated the full scope of problems, the Commission responded expeditiously. It convened a Technical Conference on January 28, 1993, and on February 10, issued an Initial Order which limited the need to file agreements which had expired before the Central Maine decision was issued. Last week, the Commission issued a comprehensive Final order which eliminates many of the problems and unnecessary burdens caused by the Central Maine policy. The Commission also provided much greater clarity about the scope of its filing requirements. While we are

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[9] Central Maine Power Company, 56 FERC ¶61,200, reh'g denied, 57 FERC ¶61,083 (1991) (Central Maine).

[10] Central Hudson Gas & Electric Corp., 60 FERC ¶ 61,106 reh'g denied, 61 FERC ¶61,089 (1992).

continuing to review their discussion of jurisdictional issues for possible concerns, we are very appreciative of the personal attention individual Commissioners gave this issue in the Technical Conference and the quick response of the current Commission.

ACCEPTANCE OF VOLUNTARY AGREEMENTS

During the tenure of the last Chairman, the Commission also increasingly departed from its historic practice of accepting voluntary agreements from traditional utilities after staff scrutiny without requiring approval by the Commission itself.[11] This practice had facilitated efficient administration of the Federal Power Act and recognized the importance accorded voluntary contracts under the Mobile-Sierra doctrine. Ironically, the Commission began to give greater scrutiny to voluntary transactions with traditional utilities at the same time that it decided to give less scrutiny to the content of transactions involving new electric generators. The effect was to tilt the competitive playing field.

As wholesale electric markets become more competitive, the new Commission should increase, not decrease, its willingness to defer to voluntarily negotiated agreements as long as they fall within a broad range of reasonableness or are approved by state commissions in competitive contexts. Regulation is intended to substitute for competition where it is not present. But where competition exists, excessive regulation can distort and undermine the benefits of competition. In such situations, voluntary agreements among affected interests give them the best opportunity to fine tune transactions to meet their particular needs.

Thus, the Commission should give considerable deference to arrangements voluntarily negotiated at arms-length among unrelated parties when no other affected party alleges harm.[12]

DEFICIENCY LETTER ISSUES

Under Section 205 of the Federal Power Act, a utility may commence a transaction 60 days after its rate schedule has been filed with the Commission--unless the Commission suspends the effective date (for up to five months) pending a hearing and explains the reasons

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[11] The Commission staff plays an important role in the efficient administration of the Federal Power Act. According to FERC, approximately 85 percent of its electric rate filings are completed by staff through delegated authority. FERC 1991 Annual Report, at 12.

[12] Such transactions often occur between a new generator and a traditional utility, between two traditional utilities or between a traditional utility and a wholesale customer.

for the suspension in writing. The Commission may also reject the rate schedule where a filing is patently defective. While the filing acceptance stage is the appropriate stage to determine whether the proposed rate is sufficiently complete to decide whether to investigate and suspend the rate, the Commission may only address the merits of a rate schedule at the hearing stage.[13]

The Commission has properly delegated to its staff the responsibility of identifying deficiencies in rate filings. Deficiency letters issued by the staff can help facilitate ultimate resolution of a case. The GAO report, Electricity Regulation: Factors Affecting the Processing of Electric Power Applications, notes that the Commission does not fully track the deficiency letter process to identify the cause of deficiencies or the length of delay in acceptance of a filing.

However, for some recent rate filings, including proposals for new approaches to transmission pricing, the staff has issued deficiency letters which suggest that the filing will not be accepted unless it is modified to conform to a new Commission decision.[14] Failure to accept a rate schedule leaves a transaction in regulatory limbo. Consequently, utilities will not initiate service until the rate schedule is accepted for filing. Any uncertainty about the effective date of a filing which delays initiation of a voluntary agreement not only denies the utility potential revenue, but also denies the customer the benefits of a desired transaction.

Deficiency letters which raise uncertainty about the effective date of a filing thus cause utilities to modify their rate filings in response to the deficiency letter to exclude innovative proposals or variations on practices which the Commission has approved in other contexts. Such utilities sacrifice rights to a hearing on the proposals which have been abandoned in response to the deficiency letter, let alone the rights to rehearing and appeal on

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[13] Commission "authority to reject the rate schedule at the filing stage is limited to those filings which are patently defective on their fact." City of Groton v. FERC, 584 F.2d 1067, 1070 (D.C. Cir. 1978), citing Municipal Light Boards v. F.P.C., 540 F.2d 1341 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972). "Summary rejection of a filing is proper only when the filing is patently unlawful." Borough of Lansdale v. F.P.C., 494 F.2d 1104, 1110 (D.C. Cir. 1974).

[14] In some cases, the staff has issued a deficiency letter to require a filing to conform to an Order issued after the filing had initially been submitted to the Commission.

those issues, in order to put the filing into effect.[15] This effectively prevents the full Commission from ever considering the merits of new proposals.

While deficiency letters often serve a useful purpose in obtaining necessary information, they should not threaten to delay a utility's right to commence a transaction or otherwise chill utility rights to raise substantive issues in Section 205 filings because of a disagreement on the merits of the rate schedule filed.

PROCESS AND PUBLIC MEETINGS

As the Commission implements its new responsibilities and addresses new competitive issues, it needs considerable input from all affected segments of the public. Notices of Proposed Rulemakings, Notices of Inquiry and Policy Statements are various forms of generic proceedings which provide the public an opportunity to address generic issues relevant to important policy issues. The choice of which type of proceeding is appropriate depends upon the issues and circumstances involved. In addition, policies and precedents are sometimes developed as a result of individual adjudication of contested cases. Individual adjudication allows the Commission to focus on the specific circumstances and effects of a particular decision or policy approach, but usually does not afford the general public the opportunity to raise generic policy considerations.

When issues arise in contested proceedings, the Commission and its staff must avoid ex parte contacts with parties to those contested proceedings. If a meeting is held to discuss the subject of a pending proceeding, all parties to the proceeding must have adequate notice. We, like others who appear before the Commission, have at one time or another, been frustrated by what appears to be excessively rigid application of these constraints. Nevertheless, we are confident that the Commission and staff have diligently complied with the applicable ex parte requirements.

On the other hand, when the Commission has no ongoing proceeding in effect, the ex parte rules do not apply.

VI. Summary

In conclusion, the new Commission and its new Chair have hit the ground running on electricity issues. They have many important decisions to make which will affect our ability to achieve the Energy Policy Act's goals of reliable, competitive and efficient

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[15] The correct procedure under the Federal Power Act is for the Commission to accept the filing and grant summary disposition, which at least is subject to appeal, or resolve the merits of the issue.

bulk power markets. Judging by their efforts to date, this Commission has demonstrated considerable knowledge, effort and initiative; a willingness to obtain input from all affected interests; a commitment to solve problems placed before it; and an open mind. While we will probably not agree on the particulars of every specific decision the Commission will make, we would like to commend the Commission and its Chair for a fine start. We look forward to working with the Commission on these matters in the future.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Notice of Request For Public Comments on Regional Transmission Group Proposal	)))	Docket No. RM93-3-000

COMMENTS OF THE EDISON ELECTRIC INSTITUTE

Summary of Comments

Edison Electric Institute is the association of the nation's investor-owned electric utility companies. It's members generate 78 percent of all power and serve 76 percent of all ultimate customers in the United States. EEI, as a member of the coalition that was involved in the development of the consensus Regional Transmission Group (RTG) proposal, is pleased to have the opportunity to comment on the Commission's request for ideas and thoughts on the potential for administrative implementation (by rule) of the consensus reached on a legislative proposal.

EEI believes that the development of voluntarily formed regional transmission groups[1] provide a reasonable and efficient option for satisfying the objectives of the Energy Policy Act of 1992 (hereafter referred to as the Act) for the development of efficient and reliable bulk power markets. FERC's new authority under the Act to issue wheeling orders will require it to make a wide range of technical and engineering judgements, including whether a wheeling request will unreasonably impair current and future power system reliability, whether new transmission facilities are needed, what facilities should be built, and who bears cost responsibility for new facilities.

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[1]Throughout these comments, we refer to regional transmission groups (RTGs) broadly to encompass any grouping of transmission owners and users formed to deal with transmission technical, planning or economic issues. Where we refer to the Regional Transmission Groups envisioned in the consensus proposal specifically, we will so indicate.

We believe that regional transmission groups, properly constituted, can serve several valuable and important functions. RTGs can resolve technical disputes or disputes with respect to the application of a particular FERC approved pricing mechanism in a much more efficient and technically accurate manner than the regulatory process required under the Act. Types of disputes that could potentially be dealt with in RTGs include disputes over the impact of a contemplated transaction on reliability; whether or not new capacity is needed for a particular transaction; what specific facilities should be built; determinations as to who benefits from such new facilities; determinations on the technical impacts of loop flow and who should be compensated; and a host of other technical issues. Resolution of disputes over such matters within an RTG could ensure that the appropriate expertise is applied to the problem in a timely and efficient manner, and that all affected RTG participants have input to the resolution.

RTGs might also decide to deal with economic and equity issues (e.g., transmission priorities and pricing). Economic issues would have to be dealt with based on pricing methods or other policies that have been approved by FERC -- either in the RTG's governing agreement or in a separate filing -- as just, reasonable, not unduly preferential or discriminatory, and otherwise consistent with the Act. Therefore, while the RTG's role could include developing proposed pricing or allocation mechanisms for FERC approval, once those policies were approved, the RTG's dispute resolution processes would be limited to administering the approved policies. FERC would retain plenary authority to approve any pricing or economic policies of RTGs, but the RTGs could assume responsibility for administering such policies. **It is also important to emphasize, however, that not all RTGs will desire to deal with pricing or equity issues, nor should they be required to.**

RTGs can thus play an important role in meeting the objectives of the Act. However, we do <u>not</u> **believe that a detailed or prescriptive rulemaking establishing a single regulatory framework for voluntary transmission groups is the best way to ensure that such groups will form in a manner that provides the full benefits that such groups might be able to provide. In addition, we believe that the consensus legislative proposal likely cannot be adopted in its entirety by rule. Changes would have to be made, and those changes might cause the**

consensus reached on the legislative proposal to be lost. And if a detailed rule contains provisions for which there is not consensus among stakeholder groups, it will be difficult to achieve consensus at the regional level for formation of RTGs. However, for reasons discussed below, it is still important that the Commission provide a regulatory framework under which RTGs voluntarily organize, gain commission approval, and obtain appropriate regulatory oversight.

In our view, the Commission can best ensure the development and success of regional transmission groups by establishing a regulatory framework that (1) provides substantial flexibility for alternative approaches adopted to regional needs and (2) gives potential participants in RTGs some certainty as to minimum requirements for approval and the benefits to be gained if those criteria are satisfied. The key is for the Commission, to the extent it can, to provide assurance that participation in such groups will ease regulatory burdens, not duplicate or add to them.

These goals can best be satisfied by the promulgation of a policy statement which states that the Commission is willing to entertain RTG filings under Section 205 of the Federal Power Act, and that while any filing meeting statutory requirements will be considered, RTGs with certain minimum criteria will be eligible for special benefits that the Commission can provide through its existing authority. The minimum criteria, with some minor necessary modifications discussed in Section VI.C. of these comments, would be based on the certification criteria of the consensus proposal. These minimum criteria include (1) membership of sufficient size and scope to carry out the requirements and objectives of the FPA and the Act; (2) governing and decision-making procedures that are just, reasonable, not unduly discriminatory, and consistent with the public interest; (3) assumption of an obligation to provide transmission services consistent with Sections 211 through 214 of the Act; (4) agreement to coordinate planning and share information; (5) agreement to conform to applicable NERC and regional reliability guidelines and criteria, and; (6) agreement to utilize a fair and equitable dispute resolution process before seeking Commission action on a transmission services request.

The special benefits to be conveyed to RTGs satisfying these minimum criteria (also discussed in Section VI.C.) would include, at a minimum, (1) the ability to have technical or factual disputes resolved within the group (policy development with respect to rates would still be the responsibility of the Commission), along with an agreement by FERC to defer, to the extent permissible under current law, to the results of pre-approved dispute resolution processes; (2) assurance by the Commission that it will not issue a mandatory wheeling order at the request of an RTG participant with respect to another participant during a reasonable period of time allotted for the RTG's dispute resolution process to be concluded, and; (3) provision by the Commission of an expedited proceeding to address complaints from participants protesting the results of previously approved dispute resolution process.

We believe that both these minimum criteria are reasonable for those groups that wish to seek the associated benefits, and describing these criteria via a policy statement would give both sufficient flexibility and sufficient certainty to potential applicants for RTG status. However, we would emphasize that whether FERC proceeds via a policy statement or a detailed rule, it should not exclude any potential regional approach that meets statutory requirements and provides benefits to the public and to the Commission. Finally, while we do not believe that the RTG concept should be implemented through a detailed rule, if FERC decides to proceed with a rulemaking, we suggest that it utilize a negotiated rulemaking process.

I. Introduction

While FERC has had responsibility for many years for analyzing rates, terms and conditions for interstate transmission services, the Commission has to date not had experience dealing with technical transmission issues. Therefore, the Commission does not have adequate staff and technical resources to make the engineering judgements necessary to administer the new, expansive requirements of the Act, particularly if there are a substantial number of requests for wheeling orders under Section 211 of the Federal Power Act (FPA). Voluntary regional groups formed to deal with technical, planning and/or economic issues can provide an alternative option for the expeditious resolution of wheeling disputes, thus potentially relieving the Commission of significant burdens.

Expeditious resolution of wheeling disputes, utilizing the technical resources available to participants of such groups will more effectively ensure the expansion of competitive, efficient, and reliable bulk power markets as called for by the Act. Adversarial regulatory proceedings at FERC are slow, costly, and ill-suited to resolving complex technical issues. Dispute resolution through regional groups or associations could provide all participants a less costly, more efficient, and more technically accurate means by which to address disputes, with FERC available as a backstop if disputes cannot be resolved within a reasonable period of time.

Transmission groups, in some instances, may also be formed to deal with interregional issues, either through groups that span multiple sub-regions or through reciprocal arrangements among regions. As will be described below, an already existing group -- the Interregional Transmission Coordination Forum (ITCF) -- was formed primarily to deal with transmission issues that cut across multiple Regional Reliability Councils within the Eastern Interconnection. The Western Systems Coordinating Council (WSCC) is contemplating a similar role within the Western Interconnection. Interregional issues could also be dealt with by reciprocal arrangements among regional groups, or through other means. However accomplished, these are functions that will truly help to ensure that the types of transmission

services encouraged by the Energy Policy Act are provided in a reliable and efficient manner.

Regional transmission groups would necessarily have to take into account state and local interests along with regional and interregional needs. One of EEI's primary concerns regarding passage of the Act was that the role of state commissions in overseeing utility planning, technical, and economic decisions would be diminished, with correspondingly increased federal control. RTGs, although not a solution to federal/state regulatory jurisdictional issues, could provide a forum through which state, local, and regional market, operating, and regulatory conditions can be more flexibly and sensitively addressed than would be available through FERC regulation. This could avoid the need for formal multi-state regulatory compacts or commissions that might require explicit Congressional authorization. However, as discussed below, it is critical that FERC, as it proceeds with consideration of the RTG concept, provide necessary assurances to state regulatory authorities that their existing role will not be diminished in any way by implementation of RTGs.

It was for all of these reasons that EEI supported an amendment to the Act that would have set up a statutory framework for regional transmission groups. The legislative approach had two important components from our point of view. First, we believed that it was important to obtain an unequivocal statutory basis for the formation of RTGs in order to clearly establish their status and role in achieving the Act's policy goals. Second, we believed that many aspects of the consensus proposal -- particularly those that either limited the rights of participants in any way or modified the regulatory authority of FERC -- would likely require statutory change. At the very least, legislation would have cleared up any uncertainty with regard to FERC's ability to implement the entire consensus RTG proposal. It is with these two objectives in mind that we need to analyze the potential of implementing the consensus RTG proposal administratively via rule.

With respect to the first issue, the Commission simply cannot provide the clear statutory authority that we originally sought. While the Commission may adopt rules and policies

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which promote the implementation of the RTG concept, any regulatory determination, no matter how well supported, imposes greater opportunity for challenge in the courts than would exist if the Act had explicitly addressed RTGs. Nevertheless, it is still important that a mechanism be in place that allows voluntarily organized groups to file their charters and rules with the Commission and receive regulatory approval[2]. Such regulatory approval must minimize potential legal challenges to RTGs.

With respect to the second issue, it is our conclusion that the consensus proposal likely cannot be implemented by rule in its entirety, as suggested by the Commission in its Request for Comment.[3] Our conclusion in this regard is discussed in the Legal Analysis (Section IV) below. This conclusion is particularly important in that the consensus RTG proposal was based on a delicate balancing of multiple interests. Some participants in the negotiations were able to accept certain requirements and provisions only in exchange for other provisions providing certain benefits. Because any final rule would likely depart from the consensus proposal, it will not necessarily represent a continued consensus among all affected interests. In particular, we believe that portions of the consensus proposal that serve to limit the authority of the FERC or the ability of participants to get a second "bite at the apple," cannot be fully implemented without changes to existing law. However, while FERC cannot fully implement the consensus proposal by rule, there are steps it can take to encourage (or at least not discourage) participation in RTGs by providing a regulatory framework that provides for both flexibility and certainty.

There are at least six "regional transmission groups" that are in the formative stages right now (as discussed later), including the Western Association for Transmission Services Coordination (WATSCO), the Southwestern Regional Transmission Association, a Pacific

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[2]This is not to suggest that regional groups necessarily must file for Commission approval. Groups such as NERC and the Regional Reliability Councils have existed for years without official Commission "certification," and other regional groups may wish to do the same, subject to the proviso that any jurisdictional matter would be brought to the Commission for final approval.

[3]Federal Energy Regulatory Commission. Notice of Request for Public Comment on Regional Transmission Group Proposal, Docket No. RM93-3-000, pp. 2-3.

Northwest group, the Western Systems Coordinating Council (WSCC - a pre-existing organization which is expanding its functions), a New England group, and the Interregional Transmission Coordination Forum (ITCF). The ITCF, in fact, currently has a filing before the Commission for acceptance under Section 205 of the Federal Power Act. These groups are forming in spite of the fact that there is currently no specific statutory or regulatory authority governing their formation or role. Each of these groups has a different charter in mind, and will operate differently, as described in Section II. Thus, flexibility in any regulatory approach is vital.

Several of these groups are forming through the creation of new organizations or agreements, but some are contemplating relying on the structure of the Regional Reliability Councils of the North American Electric Reliability Council. In spite of their differences, each group will provide services that will further the objectives of competitive, efficient, and reliable bulk power markets. We do not believe that any approach to RTGs that meets the legal requirements and objectives of the FPA and the Energy Policy Act should be precluded.

Given that groups are already forming to achieve some or all of the objectives of the consensus RTG proposal, but with widely varying mechanisms for achieving those objectives, and that many other approaches are possible, FERC needs to be flexible in approaching this issue. In our view, a detailed rulemaking may not provide this needed flexibility. Put simply, if any part of a rule imposing requirements on a potential member of a voluntary transmission group causes concern to that potential member, it is not likely that the potential member will join or participate in the development of such a group. On the other hand, if FERC adopts a fairly flexible approach, then utility and non-utility "haves" and "have-nots" within a region can develop consensual approaches that best meet the needs of everyone in the region.

For all of these reasons, we do not believe that the Commission can or should implement the consensus proposal by rule. A detailed rule, specifying what such groups should look like and how they should operate, would be counterproductive to the goal which we all seek

to achieve -- the development of effective regional groups that can resolve disputes regarding the provision of transmission services without long and costly litigation before the FERC.

This is not to suggest that the Commission can or should simply allow RTGs to develop without proper regulatory oversight or a regulatory framework for such oversight. Rather, such regulatory oversight can and should be accomplished by Commission acceptance and/or approval of RTG governing agreements under Sections 205 and 206 of the FPA. To encourage such filings and provide some certainty to groups contemplating filings, the Commission should issue a policy statement which states that the Commission is willing to entertain RTG filings under the Federal Power Act, and that while any filing meeting statutory requirements will be accepted, RTGs meeting certain minimum criteria will be eligible for special benefits that the Commission can provide through its existing authority. These special benefits would include, at a minimum, the ability to have technical or factual disputes resolved within the group (policy development would still be the responsibility of the Commission), along with an agreement by FERC to defer, to the extent permissible under current law, to the results of pre-approved dispute resolution processes.

In particular, the Commission should not limit its approval of RTGs to those that meet a set of pre-specified characteristics, but rather should tie the level of deference it gives to such groups to how closely the groups meet the minimum criteria deemed necessary for the Commission to state in advance that it intends to defer, to the extent legally permissible, to decisions and actions of the RTG.

Even in determining the minimum criteria necessary for the Commission to feel comfortable in relying on RTGs, the Commission should allow for flexibility, so as to encourage the most effective and creative approaches possible. The development of a policy statement, while not binding on future Commission decisions, will provide an important signal to potential RTG participants that, if they are able to provide transmission services and resolve disputes within the group, the Commission will not subject RTG members to a full-blown regulatory process, with all of its inherent costs. The Commission can thus, through issuance of a

policy statement, meet the goals intended by the consensus RTG proposal and provide both flexibility and sufficient certainty to groups contemplating filing for RTG approval or acceptance.

If the Commission, based on comments received in this Docket, determines that it does have statutory authority to implement the full consensus proposal administratively by rule and proceeds on that basis, it should structure such a rule to provide for maximum flexibility and that does not in any way discourage potential RTG participation. The best way to ensure that these objectives are satisfied would be to conduct a negotiated rulemaking (although, as previously discussed, we do not believe that a detailed rule is the best way to implement the RTG concept).

Below, we first discuss the evolution of the voluntary transmission group concept from EEI's perspective. We will then turn to a discussion of the consensus proposal itself to convey our sense of the role and purpose of regional transmission groups such as those contemplated in the consensus proposal. Third, we discuss why we believe that the consensus RTG proposal likely cannot, and as a matter of policy should not, be adopted through a detailed rule. Finally, we present our alternative suggestion for a Commission Policy Statement that we believe will better satisfy the Commission's goal of encouraging the development of effective and beneficial regional transmission groups, while at the same time maintaining the delicate balance of interests inherent in the consensus RTG proposal.

II. Evolution of the RTG Concept

A. The LPPC and NRECA RTG Proposals

The concept of regional groups to deal with transmission planning, technical and/or economic issues first surfaced with the development of two competing proposals -- one from the Large Public Power Council (LPPC) and a second from the National Rural Electric Cooperative Association (NRECA) and the Transmission Access Policy Study Group

(TAPS), an organization of smaller, non-transmission owning municipal utilities. Initially, neither of these proposals were legislative in nature, but rather suggested the voluntary formation of regional groups to serve certain purposes.

The LPPC proposal first surfaced in early 1990[4] and focused on the formation of an "Association for Transmission Service" that would provide for binding arbitration to resolve disputes concerning transmission access and pricing. Participation in the Association would be voluntary, but once an entity joined, it would be committed to membership for a minimum period and would agree to abide by the results of arbitration decisions. Transmission-owning members of the Association would make existing excess transmission capacity available for wheeling at rates that are cost-based and that provide a stimulus for utilities to upgrade their systems when in the public interest. Regulatory authority and processes of the states and of FERC would not change under the LPPC proposal.

At the time the LPPC proposal surfaced, EEI expressed several concerns, particularly with the lack of flexibility in allowing for different regional approaches or different types of dispute resolution. EEI was also concerned about the lack of specificity in the proposal about how such an Association would operate, and what its powers would be. Nonetheless, EEI favored the voluntary approach to access suggested by the LPPC proposal over mandatory approaches that were being suggested.

The NRECA proposal surfaced shortly after the LPPC proposal, although elements of it had been discussed earlier in the context of the Keystone Center's Energy Project on Transmission.[5] The NRECA (later joined by TAPS) proposal called for joint regional planning and use of regional transmission "grids". All participants in regional groups would accept an allocated share of the costs of the existing grid, and agree to share in the costs of transmission upgrades. In return, all participants would have equal rights to use of the

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[4]Large Public Power Council, "Proposal for a National Voluntary Approach to Promote and Coordinate Increased Electric Transmission Access." May 9, 1990.

[5]National Rural Electric Cooperative Association, "Transmission Access and Pricing Through a Coordinated Planning and Utilization Model." June 1990.

"regional grid" and a "share" in the transmission system, which would be accomplished "where practicable" through joint ownership of facilities. In addition, participants would jointly plan the transmission system to meet the needs of all suppliers and users in the region in an optimal manner.

EEI and the investor-owned utility industry in general believed, and continue to believe, that the NRECA/TAPS proposal was a thinly-veiled attempt to achieve what was unlikely to be achieved through legislation -- the formation of a common carrier electric transmission grid in all regions of the country. The NRECA/TAPS proposal would essentially preclude franchised transmission-owning utilities from planning and operating their transmission system in the best interest of their own customers. Rather, all participants in the NRECA/TAPS regional group would have equal priority access to the transmission system, regardless of whether or not they built the facilities, and regardless of whether or not those facilities were needed by their owner to lower costs of serving their own customers.

Further, the NRECA/TAPS proposal would require the development of an "optimal" regional plan for expanding the transmission system, which would be imposed downwards on individual participants, without regard to the relative costs and benefits of the regional plan on individual participants. The proposal would have imposed a significant and expensive planning requirement on participants, perhaps duplicating or replacing existing industry planning efforts. And as the recommended pricing regime of the NRECA/TAPS proposal is based on fully allocated embedded costs, apparently participants could have planning and construction requirements imposed on them for which they receive no benefit and less than full cost recovery.

B. Development of the Consensus Proposal

In the spring of 1991, Congressmen Edward Markey (D-MA) and Carlos Moorhead (R-CA), along with several others, introduced The Electric Power Fair Access Act of 1991 (H.R. 2224) that would have significantly increased the authority of the FERC to mandate transmission access. The bill did not, however, require either joint ownership or regional

planning of the type envisioned in the NRECA/TAPS proposal, nor did it contain authorization for regional transmission groups, as envisioned by NRECA and LPPC. Rather, the Markey/Moorhead legislation called for increased "contractual access" to transmission systems, by building on recent FERC decisions to promote "evolutionary" progress for the industry[6]. The Markey/Moorhead bill, with fairly minor changes, eventually was integrated into an omnibus energy policy bill, H.R. 776, introduced by Representative Phil Sharp (D-IN), Chairman of the House Energy and Power Subcommittee, and others.

Upon introduction of the Markey/Moorhead bill and subsequent omnibus energy legislation, both the Large Public Power Council, and NRECA/TAPS fashioned their regional transmission group proposals into legislative amendments for which sponsors were sought. The LPPC proposal was eventually joined by the Western Association for Transmission Systems Coordination (WATSCO) a group of California utilities that were forming a regional group (see below). In addition, a group of utilities and an independent power producer, many of whom were members of the ITCF, initiated work on an amendment that would fit the model of a regional transmission group as represented by the ITCF. Thus, when the omnibus energy bill, H.R. 776, was marked up in both the House Energy and Power Subcommittee and the full House Energy and Commerce Committee, there were three competing RTG proposals.

When the House Energy and Commerce Committee marked up H.R. 776 in March of 1992, Chairman Dingell, recognizing the three different proposals circulating, requested that all the parties meet to try and work out a single RTG proposal which could be adopted either on the House floor, or later in Conference. At that point, all of the groups that had signed on to one of the pre-existing proposals, joined by EEI, the American Public Power Association, the Electric Generation Association, Environmental Action, and others began negotiations.

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[6]Statement of Representative Edward J. Markey on the Electric Power Fair Access Act of 1991. Cong. Rec. May 2, 1991, p. E 1562.

Negotiations were conducted for about two months, but little progress was made. Major sticking points included the criteria for certification of an RTG and the level of benefits that FERC would bestow upon a certified RTG. NRECA and TAPS argued for a strong regional planning/joint use (network access) requirement before FERC could certify a group, and were unwilling to grant an RTG final dispute resolution authority in any manner (i.e., they wanted to ensure that participants on the losing end of a dispute resolution process had full appeal rights at the FERC). Representatives of other groups (EEI, LPPC, WATSCO, and some of the members of ITCF) wanted to ensure that their ability to plan and operate their systems first for the benefit of their own customers was not lost, and that if members of an RTG participated in a fair and reasonable dispute resolution process, they would be bound by any result obtained and FERC would give substantial deference to that result. Negotiations essentially reached an impasse and were suspended until September of 1992 when, primarily at the behest of FERC and the Department of Energy, the groups started meeting again shortly before the Senate/House Conference Committee began its deliberations on the bill.

Negotiations continued through the fall as the Conference Committee continued its deliberations. On the final night of the Conference, agreement on a consensus proposal was reached. Language was worked out that gave considerable flexibility for development of different approaches to RTGs and that did not impose "top down" planning requirements on transmission owners. It was left to individual regions to determine how priorities for use of the transmission system would be determined, although members of a certified RTG, under the consensus proposal, would have to undertake an obligation to provide transmission service, expand transmission capacity where needed, coordinate planning, and share information. In exchange for assuming these obligations, certified RTGs under the consensus proposal would be able to resolve disputes within the groups (within a reasonable time limit) and agreements or results of dispute resolution processes would receive deference from the FERC. Because the consensus was reached so late in the process, however, the proposed amendment was not adopted in the final version of the Act.

The discussion above points to the fact that the consensus proposal represents a very delicate balancing of widely varying interests that were involved during the months of negotiations leading up to an attempt to have the consensus proposal embodied in the Act. The willingness of all parties to give up any of their interests was based on an ability to gain benefits on the other side of the overall equation. From EEI's standpoint, the consensus that was achieved was based on having all of the elements of the consensus proposal in place, as well as achieving an unequivocal statutory authority for RTGs that clearly established the role of RTGs in achieving national policy goals and conveyed greater certainty to the prospects for RTG formation, approval, and operation.

While FERC cannot convey the same degree of certainty and authority as a statute, the conduct of RTGs within a properly articulated regulatory framework is still important, as discussed in the legal analysis below. Thus, the absence of specific statutory authority to certify RTGs should not deter FERC from approving the filings of regional transmission groups under its existing authorities. However, we are concerned that administrative adoption of the consensus proposal by rule would require changes that could have the potential to discourage participation in RTGs. By the same token, we do not believe there would be anything precluding an RTG meeting the criteria of the consensus RTG proposal from filing for FERC approval or acceptance, with whatever benefits conveyed to such a group that the Commission can offer within its existing statutory authority. Those benefits are discussed in Section VI. In the following section we describe and analyze the consensus RTG proposal in more detail.

III. EEI's Perspectives on the Consensus Proposal

A. The Proposal's Requirements for Certification

The consensus proposal, as issued by the Commission (FERC) in its November 10, 1992 Request for Public Comments, provides that any RTG could apply to FERC for certification under the amendment with sufficient information (including governing agreements of the

group) to allow FERC to make a determination as to whether the group meets the proposed statutory requirements. The Commission would have the authority to seek additional information if necessary. After providing notice and opportunity for hearing, the Commission would be required to certify an RTG if it (1) is deemed to be just, reasonable, not unduly discriminatory or preferential, (2) is otherwise consistent with Part II of the Federal Power Act, and (3) meets the specific requirements of the consensus proposal.

The specific requirements which an RTG would have to meet for certification include:

- **Membership is open to all entities subject to or able to request a wheeling order under Section 211 with a reasonable interest in transmission services in the region.**

This requirement simply provides that no entity participating in wholesale bulk power markets who can demonstrate an interest in the group's activities may be excluded. However, no entity may be required to join. Because retail customers are excluded from eligibility to obtain wheeling orders under Sections 211 and 212, we believe they should not be eligible for RTG membership.

- **Membership is of sufficient size and scope to provide transmission services consistent with Part II of the FPA and consistent with reliable, efficient, and competitive wholesale power markets.**

This requirement would preclude a regional group covering too small an area or with too few members from being certified.

- **An affirmative obligation by its members to provide transmission services in a manner that is at least equivalent to what would be required under the FPA absent the RTG.**

This obligation to provide service obviates the need for a service requestor to seek a wheeling order from the FERC to obtain service consistent with the FPA. This obligation provides assurances to potential members that access will be available to them to the same degree that it would otherwise be available were they to seek a mandatory wheeling order

under Section 211, rather than through the group's mechanisms. This requirement also provides an agreement to make good faith efforts to expand capacity when needed, subject to the ability to get the necessary federal, state, and local approvals and property rights, as provided for in the Act.

- **A requirement of its members to maintain electric system reliability, as measured by continued conformance with generally applicable and recognized guidelines.**

Members of a certified RTG would have to follow any applicable and recognized reliability guidelines and criteria. In our view, the only generally applicable and recognized guidelines that exist and are appropriate are the NERC and Regional Reliability Council guidelines and criteria, and members of all RTGs should be required to adhere to those guidelines. While the language of the consensus proposal departs somewhat from the language in the Act with respect to this reliability requirement, the difference was not intentional, at least from our point of view. The final language of the Act was not available to the negotiators when this provision was agreed to, and thus the consensus proposal's language was based on an earlier draft of the legislative provision dealing with reliability.

- **Members must agree to coordinate planning on a regional basis and share transmission planning information as provided for in the Governing Agreement, and on request, with the goals of ensuring that resources of members and non-members (when known) are accommodated reasonably and efficiently, ensuring efficient expansion, and enabling reasonable and efficient utilization of members' power supply resources.**

Under the consensus proposal, members of certified RTGs would be required to coordinate planning and share information to facilitate the meeting of certain goals. It is important to note that the consensus proposal does not specify how such coordination should be done, and does not require that an RTG develop a "top down" regional plan that would optimize the supply of resources on a regional basis[7]. Members of an RTG could meet this planning

[7]This fact is emphasized by the limitation in §216(a)(3) of the Consensus Proposal on FERC's ability to condition certification of a group on any requirement that individual members accept a planning decision made by an RTG (if there is any such RTG planning

requirement without sacrificing the ability to continue to do their own planning, with state regulatory oversight. Members would simply be required to take into account regional needs when they do their individual planning. It is envisioned that, where there are disputes as to a planning outcome, those disputes could be resolved through the group's dispute resolution process.

It also must be recognized that the role of state regulatory commissions will continue to be critical in this process. We would envision that state commissions will be fully aware of the RTG process, and in most cases will have to approve any jurisdictional utility's expansion or construction plans. In addition, it is our view that, where mechanisms for such planning coordination and information sharing already exist in a region through other means, and those mechanisms are available to all RTG participants, it is not necessary for an RTG to duplicate or replicate those functions. An RTG could simply include as part of its governing agreement an agreement to rely on other available processes for the coordination of planning. Thus, while we recognize that coordinated planning and information sharing is an important function of an RTG, considerable flexibility must be provided as to how it should be accomplished.

- **Governance and decision-making procedures must be fair and must be structured to account for the interests of all members. The governing agreement must have one or more dispute resolution procedures which are fair and equitable for all members, and which provide for the timely resolution of any dispute. However, members cannot be required to give up their right to FERC review of a decision as a condition of membership.**

FERC must find that all voting procedures, procedures for reaching decisions, and dispute resolution procedures are fair and reasonable. This does not mean that all participants have to have an equal voice in all matters, or that the minority can veto any decision, for example. It simply means that, whatever process is used to reach decisions, itcannot unfairly ignore any member's interests.

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requirement in the RTG's governing agreement, which, of course, is also not required).

The requirement for dispute resolution is key from our point of view, as we see dispute resolution being the central role of RTGs. The consensus proposal envisions that an RTG could adopt any form of dispute resolution, including binding arbitration, non-binding arbitration, mediation, and the like. RTGs may also adopt more than one form of dispute resolution from which members could choose. The only limitation is that the RTG cannot require binding arbitration of the type that would limit a participant's right to appeal decisions to the FERC as a condition of membership, although participants could certainly agree to resolve disputes in that manner after joining.

We envision that the role of RTGs would be to administer policies, rate mechanisms, or formulas previously approved by FERC. We do not believe that RTGs themselves can or should have the ability to determine pricing policies or rate methods, or subject such issues to dispute resolution. Rather, once FERC has approved a rate methodology in the governing agreement or related filings, it should be the role of the RTG to administer the approved rate methodology. If jurisdictional policy issues arise that are not covered by the governing agreement or other approved filings, they should be the subject of a separate filing to the Commission, and the governing agreement must not preclude parties from making such filings directly to the Commission. Dispute resolution should be used only to resolve disputes over how to administer the governing agreement or related filings relative to particular transactions.

- **Members of a certified RTG that are not FERC jurisdictional under Sections 205 and 206 of the FPA must agree that they will file rates, terms and conditions of transmission services with the Commission that will be subject to suspension and refund as if that member were subject to Sections 205 and 206.**

A particularly thorny issue that the consensus proposal dealt with is how to address transmission services provided by non-jurisdictional utilities within an RTG. The Act makes any provider of interstate transmission services (including those entities not defined as "public utilities" subject to FERC ratemaking jurisdiction under FPA Sections 205 and 206) subject to a FERC wheeling order under the terms of Sections 211 and 212. However, in the context of an RTG, transmission services would be provided voluntarily, and thus there

is no mechanism for requiring non-jurisdictional utilities to get regulatory approval of the rates, terms and conditions of service. This provision provides that as a condition of certification, non-jurisdictional entities would file their rates, terms, and conditions for transmission service as though they were jurisdictional agreements. Our Legal Analysis (Section IV of these comments) discusses how this issue might alternatively be dealt with.

- **A Governing Agreement may establish service priorities and may provide for reciprocal arrangements that extend beyond the RTGs region.**

The establishment of service priorities is not required, but is allowed under the consensus proposal. The issue of reciprocal arrangements is an important one. However regions eventually evolve, there will always be so-called "seams" between regions, where entities in one regional group may seek services from members in another regional group. While the consensus proposal envisions that such service could be obtained by seeking a Section 211 wheeling order, and a FERC order to build if necessary, a more efficient way to deal with the problem might be for individual RTGs to establish reciprocal arrangements with one another. Another way would be to establish separate "supra" regional groups that would plan and coordinate services between and among sub-regions. Either approach is envisioned and permitted under the consensus proposal.

- **The Commission may impose any additional terms and conditions as it finds necessary to satisfy the public interest, but an RTG and its members are given 60 days to determine whether or not to accept the Commission's conditions of certification.**

This provision ensures that the nature of RTGs remains voluntary in that even if the Commission determines that it needs to impose additional conditions before certifying a group, the RTG or any of its members may refuse to accept such conditions and either disband or re-seek certification on a different basis (or not seek certification at all).

This provision also gives FERC the ability to condition RTG approval on changes to the governing agreement or by-laws that ensure that access and pricing policies of the group are

consistent with the law and existing FERC policies. In this regard, FERC should ensure in its approval or acceptance of an RTG filing that policy issues that may arise in the course of the RTG's deliberations, if not covered in the approved governing agreement or separate, related filing, are filed with the Commission. FERC should limit the role of RTGs to administering all aspects of agreements approved or accepted by FERC. Access or pricing policy issues that go beyond the scope of filed agreements should not be dealt with until they have been reviewed and approved by the Commission in another context.

- **The Commission may not certify an RTG if all state commissions with retail rate jurisdiction over RTG members object to such certification.**

While no individual state can effectuate a veto, if the veto is unanimous it would be binding on the Commission. It was envisioned that states would have a strong role in RTG formation and its processes. In fact, no utility within the jurisdiction of a state regulatory body is likely to participate in an RTG if that regulatory body objects. Furthermore, states retain the same jurisdiction with or without an RTG, and any decision of an RTG or its members affecting retail rates or the siting, certification, or construction of facilities will require the normal state approvals. Furthermore, states may find RTGs in their interests as a mechanism for voluntary coordination among utilities within a region. However, this provision was intended to preclude an individual state from vetoing the formation of an RTG that is generally recognized to benefit a region.

B. Commission Authority and Exemptions for RTGs

In general, the Commission would retain authority to modify or revoke its certification of an RTG if the RTG no longer meets the requirements under which it was certified. In addition, the Commission can review actions implementing the Governing Agreement to ensure consistency with the Agreement and with the FPA, and to ensure that such action is just, reasonable, and not unduly discriminatory or preferential. The preferred course of action suggested by the consensus proposal in such cases is for the Commission to remand

the action back to the RTG for modification by the RTG, but authority is also provided to the Commission to modify the action itself when necessary.

One of the major benefits of the consensus proposal, from EEI's point of view, was the ability to resolve disputes within an RTG, with FERC giving deference to the results. The final language of the consensus proposal probably provides a lower requirement for such deference than we would have ideally wanted, but it does provide either for a standard of substantial deference when decisions are rendered on adequate record by an independent arbitrator in a process providing due process for members, or for a rebuttable presumption that an action is within the scope of and consistent with the Governing Agreement or filed rate.

The consensus proposal does give participants the option, on a case-by-case basis, to agree that they will not seek Commission review of an arbitrator's decision. In such cases, the Commission may not set aside or modify a decision on the basis of complaint of such member (except in cases such as fraud), but it is not limited from modifying the decision on its own motion, or upon intervention by another party, subject to the provision of deference as described above.

The consensus proposal also provides that members are exempt from Section 211 wheeling orders requested by other members, unless the RTG's dispute resolution process fails to provide a final resolution of a dispute within a reasonable time. Members are also exempt from the requirements of Section 213(a) with respect to other members, meaning they do not have to respond to requests for wheeling service within 60 days with a written explanation of why service won't be provided under requested terms and conditions (or under what conditions service will be provided). The consensus proposal specifically provides that no entity can be compelled to join an RTG, nor can any entity be precluded from leaving an RTG, subject to the terms of the governing agreement.

The consensus proposal also provides that Sections 205 and 206 apply to the Governing Agreement, including any rates, terms, and conditions of transmission services provided for

in the Governing Agreement and any changes thereof. Thus, it is envisioned that an RTG could propose rates, terms, and conditions under which service is provided, as long as such rates are filed for FERC approval as part of the Governing Agreement or separately under Sections 205 and 206. However, the exact issues to be dealt with by the RTG are left open -- they need not include rates, terms, and conditions of transmission services in their governing agreements.

C. Federal Entity Participation in RTGs

The consensus proposal specifically provides that federal power marketing administrations or any federal agency to which Section 211 applies may be a member of an RTG and may subject itself to binding arbitration (if that is available to RTG members) or other dispute resolution processes. The consensus proposal also provides that with respect to federal agencies, the FERC must review and either approve or set aside any binding arbitration decision. This provision was particularly important because, absent explicit statutory authority, it is unclear whether federal agencies could fully participate in an RTG, particularly if that RTG utilizes binding arbitration.

D. Other Law

The consensus proposal contains a savings clause that preserves all state authorities concerning siting, environmental, or utility regulation that would otherwise be lawfully exercised over members of a certified RTG. This provision makes it absolutely clear that states maintain a major role in approving agreements and decisions that affect jurisdictional utilities and the siting and certification of new facilities.

E. Conclusions Drawn from Consensus Proposal

The consensus proposal, if adopted as legislation, would have provided substantial flexibility for alternative regional approaches to the RTG issue. For example, the legislative proposal would have given RTGs substantial flexibility to determine their own geographic boundaries. Flexibility was also provided for groups to determine how they would coordinate planning and share information. The issues to be addressed by an RTG, and the dispute resolution mechanism to be utilized were also left open to RTG determination. While procedures were proposed to deal with rates, terms and conditions of transmission services provided within an RTG, there is nothing requiring RTGs to address these issues. The only really hard and fast requirements proposed are that members of the RTG assume an obligation to provide transmission service and expand their system where needed, consistent with the FPA, and that RTGs have at least one dispute resolution process in place.

There were three key features of the consensus proposal from EEI's point of view. First, adoption of the consensus proposal would have established a statutory framework for RTGs and signaled the clear intent of Congress that such groups promote national policy goals and are in the public interest. Thus, enactment of the consensus RTG proposal would have given substantially more comfort to the industry that it could proceed with the full realm of potential RTG activities without fear of protracted litigation.

Second, within the statutory framework that was proposed, there were certain provisions limiting the rights of participants (e.g., to obtain a wheeling order against another participant or protest results of voluntarily utilized arbitration). These rights would have been surrendered voluntarily by participants in exchange for receiving the benefits available from participation in an RTG.

Third, certain regulatory responsibilities of the Commission would also have been limited or modified by the proposed legislation. For example, the Commission would have been unable to issue a wheeling order under Section 211 until dispute resolution had run its course, or the time limit adopted had been exceeded. The Commission, in addition, would

have been required to provide a rebuttable presumption or substantial deference to actions of a certified RTG. In addition, the Commission would have been precluded from imposing any conditions on an RTG that would require participants to accept a planning decision of the RTG.

It is because of the above three issues that EEI supported the consensus proposal in a legislative framework. It was our belief at the time that these objectives could only be accomplished by statute. The key questions to be addressed as a result of the Commission's request for comment thus are whether or not FERC can (1) limit any rights of RTG participants; (2) limit its own authority or provide deference to RTG actions, and; (3) provide sufficient certainty that each RTG promotes national policy goals, including the pro-competitive policies of the Act, to minimize the opportunity for extended litigation which might chill utility participation in RTGs. These issues are addressed in the following Section.

IV. Legal Analysis

A. FERC Authority to Approve Voluntarily Filed RTG Agreements

The first question that arises in examining the role of FERC in establishing a regulatory framework is whether or not the Commission has the authority to accept and approve voluntary filings that may be made by RTGs under the FPA. We believe that FERC does have such authority, as discussed below.

In essence, an RTG agreement is a voluntary transmission service agreement among multiple parties. As such, it is not much different than any other multi-lateral transmission services agreement or power pooling agreement, both of which are clearly subject to the jurisdiction of FERC under Sections 205 and 206 of the FPA. Thus, we believe RTG

agreements can be filed, and accepted and approved by FERC under Sections 205 and 206[8]. Furthermore, the Commission's authority under Section 202(a) of the FPA and Section 205 of the Public Utility Regulatory Policies Act (PURPA) to promote the voluntary coordination of electric utilities could be used to approve RTG agreements as well.

However, several problems remain. First of all, there are potential members of RTGs (such as municipals, cooperatives, and federal power entities) that are not subject to FERC jurisdiction for purposes of rate filings under Sections 205 and 206. Thus FERC has no authority under Sections 205 and 206 to enforce provisions of an RTG agreement against those non-jurisdictional entities, nor to suspend their transmission rates subject to refund as required for jurisdictional utilities.

One option to minimize the effects of this problem would be for the Commission to simply provide expedited treatment of requests for Section 211 wheeling orders by members of an RTG who claim that a non-jurisdictional member has failed to provide transmission service in accordance with the RTG's governing agreement.

Another approach would be to limit RTG filings to Commission approval under Sections 205 and 206 and simply let applicable contract law apply to agreements between jurisdictional and non-jurisdictional members of RTG. This would require jurisdictional members to seek enforcement of the agreements through the courts, but given the fact that these groups are voluntary and no one would presumably join who did not intend to adhere to the agreement, this option might be acceptable to some RTGs, given the alternatives.

B. Can the Consensus Proposal be Implemented by Rule?

While we believe that many aspects of the consensus proposal could be adopted by rule, there remain in our minds substantial questions as to whether the entire proposal could be

[8]It is important to note as well that these agreements approved by the Commission under Sections 205 and 206 often include entities that are not jurisdictional to the Commission under those Sections, as would RTG agreements.

adopted, absent explicit statutory authority. In particular, we have concerns on the following provisions of the consensus proposal:

1. Section 216 (a) -- Certification Criteria

As previously stated, we do not believe that the Commission, through a rule, can exclude RTGs that do not meet all of the criteria in the consensus proposal for certification. The Commission could, however, provide a sort of "safe harbor" where groups meeting a set of minimum criteria would be eligible for benefits not fully available to non-complying RTGs. But the more detailed and limiting these minimum criteria become, the less likely it is that RTGs will form. It is also important to note that absent legislation, the Commission can not adopt a rule (or other regulatory framework) that is exclusive of other filings that do not meet all aspects of the rule. Therefore, non-conforming agreements could be filed, and would have to be considered by the Commission under the standards of the FPA.

Thus, even though FERC likely can incorporate the consensus proposal's certification criteria into a non-exclusive rule, we think that in a regulatory context, the inclusion of such detailed certification criteria is unnecessary. In a later section of these comments, we discuss appropriate minimum criteria, based on the consensus proposal, which we believe are both legally adoptable and sufficient to satisfy the intent of the consensus proposal.

One aspect of the consensus proposal's certification requirements that are problematic is the requirement that non-public utilities that are not jurisdictional under Sections 205 and 206 file their rates, charges, terms and conditions of transmission service and make those filings subject to suspension and refund as if subject to 205 and 206, if the governing agreement so requires. Absent statutory authority, it is not clear whether non-public utilities could be required to file rates under Section 205 or have those rates enforced. While some potential solutions to this problem were discussed above, we think it unlikely that the consensus proposal's solution can be imposed by rule.

2. Section 216(b) -- Commission Authority Over RTGs

The consensus proposal provides that the Commission must grant substantial deference or a rebuttable presumption to certain actions or dispute resolution results of a certified RTG. FERC's ability and willingness to implement this provision by rule is uncertain. There is precedent for the Commission granting a rebuttable presumption to mutually agreeable actions interpreting agreements.[9] Whether this same presumption would be available in cases where a decision is made through dispute resolution and one party desires to protest the results is not clear. FERC must also decide what level of substantial deference could be provided, either by rule or otherwise, in cases where substantial deference applies. These issues raise considerable uncertainty as to whether the full benefits of the consensus proposal can be gained administratively. Whether FERC can and will provide sufficient deference to group decisions to provide sufficient advantages to participating in RTGs is a critical issue which the Commission should carefully consider.

The consensus proposal also allows participants in an RTG to limit, on a case-by-case basis, their own rights to protest the results of a dispute resolution process at the Commission. We are also concerned that this limitation on the rights of parties would not be enforceable absent legislation. There is a federal statute, the Administrative Disputes Resolution Act (ADRA) -- as amended in 1992 by the Administrative Procedure Technical Amendments Act.[10] The 1992 amendment permitted agencies to apply the ADRA to decisions involving disagreements between private persons who would be substantially affected by the agency's ruling.[11] While the Commission has not yet acted on its 1991 Notice of Inquiry regarding implementation of the ADRA, the Commission has indicated in several individual cases that

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[9]See FERC Order No. 23, affirmed, Pennzoil Co. v. FERC, 645 F.2d 360, 392 (5th Cir. 1981), cert. denied 454 U.S. 1142 (1982); Pennzoil Co. v. FERC, 789 F.2d 1128, 1136-7 (5th Cir. 1986).

[10]P.L. 102-354, approved August 26, 1992, 106 Stat. 944.

[11]5 U.S.C. § 571(8) as redesignated by P.L. 102-354.

arbitration and other methods of alternative dispute resolution may be included in agreements subject to its jurisdiction.[12]

However, dispute resolution is treated differently in the consensus proposal than it is in the ADRA. Specifically, while the consensus proposal provided that parties, on a case by case basis, can waive their right to seek FERC review (other than on grounds covered by sections 10 and 11 of Title 9 of the United States code), the ADRA specifically gives the administrative agency (i.e., FERC) 30 days to vacate an arbitration award before it becomes judicially enforceable. Thus, under the ADRA, parties to a dispute resolution process can seek to have the result overturned.

Thus, while the Commission can sanction the use of arbitration or any other process to resolve disputes among parties to an agreement subject to its jurisdiction, it is not clear that the Commission can allow parties to waive their rights at a "second bite at the apple."[13]

The consensus proposal would have also precluded FERC from issuing a Section 211 wheeling order on the basis of a request from a member of a certified RTG with respect to another member, at least during a limited period in which the RTG's dispute resolution is ongoing. It is not clear whether FERC can provide such a limitation by rule. Eligible applicants are granted a statutory right by the Act to seek mandatory wheeling orders after requesting such service and waiting 60 days for a response from the transmitting utility. However, the statute imposes no time limit on when FERC must respond. Moreover, the statute gives FERC considerable discretion in issuing wheeling orders and requires it to find that such orders are in the "public interest." We believe that FERC has adequate discretion to indicate that it will implement the "public interest" standard by permitting an RTG's

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[12]See e.g., Northern States Power Company, 59 FERC ¶ 63,003 at 65,054 (1992), citing Madison Gas and Electric Company, 56 FERC ¶ 61,447 at p. 62,557 n. 6 (1991), and Kansas Gas and Electric Company, 28 FERC ¶ 61,112 at p. 61,195 (1984).

[13]EEI does not address herein whether a court of competent jurisdiction might have the power to hold parties to their agreement to waive their rights, in a binding arbitration contract, to protest arbitration decisions to FERC.

dispute resolution process to proceed as specified in the approved RTG agreement and by deferring any action on a Section 211 request which is subject to such a dispute resolution process. However, the Commission must ultimately articulate how it plans to exercise its authority in such situations. Again, if RTG participants are faced with the full gamut of both FERC regulatory proceedings and RTG dispute resolution processes, advantages of RTG participation are significantly diminished.

An additional benefit of the legislative proposal was that it gave federal entities (PMAs and TVA) explicit ability to participate in RTGs. We do not believe that the Commission could provide such ability through a rule, although federal entities could be dealt with in the same manner as other entities which are not jurisdictional under Sections 205 and 206 as discussed above.

Finally, and perhaps most importantly, the consensus proposal explicitly retains all state siting, environmental, and utility regulatory authorities[14]. Concerns have been expressed by NARUC and several state commissions that, absent legislation to the contrary, FERC approval of an RTG agreement would pre-empt state authority under the Mississippi Power & Light doctrine.[15] This concern may be reinforced by Section 205 of PURPA,[16] which authorizes the Commission, after notice to the affected state and an opportunity for hearing, to exempt utilities from state regulatory requirements that prohibit or prevent voluntary coordination.[17] We believe that these are concerns that must be addressed by the Commission in any regulatory action related to RTGs.[18]

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[14]Consensus Proposal, § 216(d).

[15]Cf. Mississippi Power & Light Company v. Mississippi Ex Rel. Moore, 487 U.S. 354 (1988).

[16]16 U.S.C. § 824a-1.

[17]See Central Power and Light Company, 8 FERC ¶ 61,065, on rehearing 9 FERC ¶ 61,011 (1979).

[18]There is precedent for the Commission granting deference to state commission decisions. See, e.g., Consolidated Edison Company of New York, Inc., 31 FERC ¶ 61,338

C. Competitive Considerations

The RTG proposal was intended to encourage consensual resolution of transmission issues in a manner which is consistent with the national policy of promoting reliable, efficient and competitive wholesale power markets. Past experience with the development of power pools demonstrates that a regional effort such as this may well be subject to extensive litigation claiming that the agreement is inconsistent with the policies of the Federal Power Act as well as the antitrust laws. In the power pool cases, FERC, with the approval of the courts, concluded that the power pool agreements satisfied the applicable statutory requirements.[19] However, the mere threat of such litigation challenging RTG agreements, even if not ultimately successful, imposes substantial risks and uncertainties which could chill participation in nascent RTGs and/or prevent implementation of RTG agreements until all pending litigation is complete.

Adoption of the consensus proposal in statute would have confirmed that implementation of RTGs within the stated statutory criteria is an important national policy goal and would have substantially reduced the likelihood of litigation being brought to challenge nascent RTGs as inconsistent with the Federal Power Act or other laws, including the antitrust laws.

Although the Commission cannot speak with precisely the same authority as a statute, it must take considerable effort in its decisions and policy to minimize the potential for chilling litigation by affirmatively addressing why RTGs, established within a defined policy framework, promote the policies of the Federal Power Act and of the antitrust laws. It is well-established that the Commission must consider antitrust factors as part of its

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(1985), Consolidated Edison Company of New York, Inc., 15 FERC ¶ 61,174 (1981), and Consolidated Edison Company of New York, Inc., 39 FERC ¶ 61,003 (1987).

[19] Mid-Continent Area Power Pool Agreement, 58 F.P.C. 2622 (1977), affirmed, Central Iowa Power Cooperative v. FERC, 606 F.2d 1156 (D.C. Cir. 1979), New England Power Pool Agreement (NEPOOL), 56 F.P.C. 1562 (1976), affirmed, Municipalities of Groton v. FERC, (D.C. Cir. 1978).

responsibilities under the Federal Power Act. Central Iowa Power Coop. v. FERC, supra. That case arose under the FPA, not the antitrust laws, but its analysis of the power pool application at issue contains an extensive antitrust analysis.

Thus, in any regulatory action related to RTGs, the Commission must provide a thorough an analysis of RTG policies and RTG applications in order to minimize the possibility of protracted litigation that could delay the formation of RTGs (with the recognition that FERC cannot preclude the filing of such litigation).[20] This analysis would require detailed findings and support to be effective. Under existing antitrust law, such findings could provide a substantial basis either for implied immunity or for a rule of reason justification for the RTG program.[21] Nevertheless, such findings cannot preclude the filing of litigation challenging RTGs and will never be as effective as a statutory mandate would have been in avoiding extensive litigation over these issues.

V. Can RTG Benefits be Obtained Through Detailed Rules?

A. The Need for Flexibility

First and foremost, we believe that any action taken by the FERC must provide flexibility for different regional approaches to transmission groups, while at the same time providing some guidance as to minimum requirements for FERC approval or acceptance. There are already several regional and interregional groups being formed which are adopting differing approaches (summarized below) to meet, among other goals, the overall goals of a more efficient and less costly process to provide transmission services required by the Energy Policy Act. If the Commission's goal is to encourage the formation of RTGs (as it states

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[20] For example, the Commission should explain why it is reasonable under the Federal Power Act as well as antitrust law for a regional transmission group consisting of wholesale sellers and wholesale customers to exclude retail customers.

[21] See Town of Concord v. Boston Edison Company, 915 F.2d 17 (1st Cir. 1990).

in its request for comment), it should not take any action which would discourage this evolution of differing regional approaches.

1. The Interregional Transmission Coordination Forum

The Interregional Transmission Coordination Forum (ITCF) may be the farthest along in terms of a regional group formed to deal with transmission issues and disputes, even though the ITCF was not formed as a regional transmission group of the sort envisioned by the consensus proposal. ITCF has already filed its organizational materials and agreements for acceptance or approval as a contract or practice affecting rates under Section 205 of the FPA. The ITCF is an open membership organization covering the entire Eastern Grid, with voluntary resolution of technical disputes as its primary focus. Current members of ITCF include investor-owned, municipal and cooperatively-owned electric utilities, a federal agency (the Tennessee Valley Authority), qualifying facilities and independent power producers.

ITCF's major activities include dispute resolution via mediation, cooperation and information exchange on interregional interchange, development of proposed methods for dealing with parallel flow, and exchange of planning information. Members must subscribe to principles of the group, which include (1) an agreement that any new power transfer arrangements will meet NERC reliability criteria and respect the rights of owners and other users of affected facilities, (2) an opportunity for entities likely to be affected to comment on new power transfer arrangements prior to commencement, and (3) development of appropriate standards for reliable, efficient, and equitable utilization, planning and completion of additional facilities.

One of ITCF's major activities to date has been their work on a proposed "General Agreement on Parallel Paths" (GAPP) which the ITCF is considering implementing on a voluntary experimental basis after filing with the Commission for approval. The GAPP, developed by a Committee of the ITCF, proposes a method for handling parallel flow within and between regions, but as yet has not addressed how to price such parallel flows. The ITCF agreement filed with FERC also does not address transmission pricing issues directly,

but rather intends that members would continue to file their own transmission pricing/service agreements with the FERC as they do now. Thus, ITCF, at least initially, plans to limit its activities to technical issues that are interregional in nature.

2. Western Association for Transmission Systems Coordination

The Western Association for Transmission Services Coordination (WATSCO) is a group being formed within California that has been under discussion for the past year or so. Investor-owned utilities, municipals and non-utility generators have been involved in the discussions regarding formation of the group. The goal of WATSCO is to assure greater transmission access while continuing to protect the interests of the customers of member utilities. WATSCO's membership is open to all wholesale buyers or sellers of electricity. The Draft WATSCO bylaws provide procedures for voluntary coordination of transmission planning, the provision of wholesale transmission access, exchange of information, and resolution of disputes -- all within the context of state and federal regulation.

The draft bylaws would require members to provide transmission services over their existing systems when existing customers and investors are protected from economic or reliability harm, and to build additional transmission capacity, when needed, subject to regulatory approval. WATSCO also intends to deal with pricing issues -- although the basis for pricing is still being negotiated. WATSCO's coordinated planning process, which will be updated biannually, requires that members exchange information about their present and future transmission availability, and provide access to transmission data. Finally, WATSCO proposes to use binding arbitration to resolve disputes.

3. Southwestern Regional Transmission Association

A Southwest Regional Transmission Association (SWRTA) has also been under discussion and has formulated draft bylaws which are being circulated among potential members for

review. SWRTA's draft bylaws cover transmission access, transmission pricing, and coordination of planning. While SWRTA intends to adopt a dispute resolution process, the process to be utilized is still being negotiated. With respect to access, the draft bylaws provide procedures for service requests and studies by a transmitting member to determine if sufficient capacity is available. If an initial study suggests that additional capacity is needed, further studies are to be conducted to show what upgrades, additional facilities and/or interconnections are needed and various options available. If the requestor elects to proceed, the transmitting member is obligated to construct facilities. Where new facilities are required on the bulk transmission system, other members will be invited to participate.

The pricing principles of the draft bylaws provide for pricing that does not result in subsidization by one member of the native load customers or shareholders of another member. For incremental facilities, the price charged will reflect the benefits of the upgrade to the transmitting utility. Finally, with respect to coordinated planning, SWRTA proposes that a Planning Committee comprised of a representative from all members that wish to participate will be formed. Such a Committee would annually review and document the 10 year transmission plans of members, compile planning data and criteria of all members, ensure that transmission request study results are made available to all members, facilitate joint planning studies for bulk system projects, and interface with the Western Systems Coordinating Council.

4. Pacific Northwest Voluntary Transmission Association

A group of Pacific Northwest entities have been meeting to discuss the possibility of forming a Northwest Voluntary Transmission Association (NWVTA). The discussion group has included investor-owned utilities, public agency and direct service customers of Bonneville Power Administration (BPA), non-utility generators, and municipals and Public Utility Districts (PUDs). The discussions of the NWVTA group have led to a "Statement of Principles" which embody the Northwest perspective. The issues covered in the Statement include basic policies, membership, obligation to provide transmission service, coordinated

planning, dispute resolution, and a governing board. The Statement establishes the goal of the organization as providing for wholesale firm and non-firm access, dispute resolution, and coordinated transmission planning. As with WATSCO and SWRTA, the NWVTA Statement provides for protection of retail customers, as well as wholesale power and transmission customers and investors. The Statement explicitly provides that group actions will be consistent with NERC and regional reliability policies, criteria and guidelines.

The NWVTA also envisions that state regulatory agencies would be granted ex officio membership status without voting rights. While the Statement does not address pricing in any detail, it does suggest that the group's bylaws will contain cost-based pricing rules. Coordinated planning within the group will be conducted via the timely and systematic sharing of relevant data, models, and individual members' expansion plans. The group intends to rely on the Western Systems Coordinating Council and other groups to the maximum extent possible to accomplish the goal of coordinated planning. The group proposes to utilize binding arbitration, upon request of either party, to resolve disputes. The group also intends to help arrange for reciprocal services from other RTGs.

Finally, the participants in the NWVTA discussions have also initiated discussions with members of WATSCO and SWRTA about the possibility of forming an RTG that covers the entire western region, as opposed to three distinct RTGs. It is not clear yet whether such a region-wide RTG will be proposed, and how it will relate to the WSCC, as discussed below.

5. Western Systems Coordinating Council

The Western Systems Coordinating Council (WSCC) has developed a proposal for taking a much larger role in the coordination of planning within the WSCC region, which covers the entire western interconnection. The proposal includes guidelines for regional planning, regional data bases, and exchange of information. The proposal would place the WSCC in the role of either sponsoring a single region-wide RTG, or an "umbrella" organization to coordinate, through reciprocity agreements, any RTGs that may form within the WSCC

region, with the WSCC coordinating regional planning among the RTGs. The WSCC plan also suggests that the Council would identify and promote the mitigation of transmission constraints within the region. The WSCC has also proposed making available alternative dispute resolution procedures running the gamut from an advisory panel to assist parties in their discussions all the way to non-binding and binding arbitration.

6. New England Regional Transmission Agreement

The New England Regional Transmission Agreement (RTA) began to develop about four years ago. Investor-owned utilities, municipals, non-utility generators, and state and federal regulatory agencies have been involved in discussions and development of the RTA. The New England RTA is a comprehensive agreement which provides for transmission access and a pricing methodology available to all NEPOOL participants and non-utility generators in the New England region for the transmission of energy and capacity. The RTA, as currently being negotiated, includes provisions for the construction and cost responsibility of future transmission facilities. There are also voting procedures to facilitate conflict resolution. The agreement specifically excludes transmission for retail customers, total requirements services, and integration services.

7. Mid-Continent Area Power Pool

The Mid-Continent Area Power Pool (MAPP) is now considering instituting a megawatt mile transmission services charge for all transmission services provided between members under MAPP Service Schedule F. The pricing proposal would compensate transmission-owning utilities for parallel flows. This pricing methodology is conceptually consistent with the RTG proposal, in that rate development would be based on all the transmission components of the regional grid actually providing the transmission service, rather than a hypothetical contract path.

MAPP also uses a Design Review Committee to review the transmission and generation plans of member utilities to prevent adverse affects on reliability and other MAPP members

of the plans of individual members. MAPP also recently established an Operating Review Committee to insure continuing compliance with NERC reliability criteria by all members. In both instances the MAPP developments are conceptually consistent with the RTG proposal, but reflect the unique membership and needs of MAPP.

The above discussion emphasizes the differing approaches being developed across the country. Emerging regional groups are focusing attention on different issues, developing differing mechanisms to coordinate planning and share information, and are developing for different purposes (e.g., to deal with interregional issues as opposed to intraregional issues). Thus, we believe that any FERC action must recognize the need for diverse approaches to the regional transmission group concept. The Commission should not discourage the formation of such regional groups by imposing requirements for regulatory acceptance that would discourage full participation by all eligible entities. Given the time and attention needed to form such a group, and the strong commitment it represents on the part of participants, FERC should not establish inflexible requirements that may discourage the many efforts and discussions already underway. We envision that, even if groups start out with relatively modest objectives, as they begin to gain experience and comfort with the process, they will expand their breadth of activity. FERC's primary goal, whatever its action, should be to ensure flexibility in approaches and encourage participation in those groups that do form by providing some certainty that diverse approaches that meet minimum requirements are acceptable and will receive some deference to their decisions.

Imposing substantial requirements on voluntary groups runs counter to these goals. A detailed rule, tied down to a single approach, might inadvertently discourage participation in RTGs. If any part of a rule imposes requirements on a potential member of an RTG that causes concern to that potential member, it probably will not join or participate in an RTG. On the other hand, if FERC adopts a fairly flexible approach, then utility and non-utility "haves" and "have-nots" within a region can negotiate consensual approaches that best meet individual needs within the region. The fact that RTGs are already forming via

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consensus by potential participants on draft charters or guidelines demonstrates that this consensual approach works.

B. The Consensus Proposal Cannot be Fully Implemented by Rule

As noted in the legal analysis above, there are certain aspects of the consensus proposal, particularly those that tend to limit the authority of the FERC or the ability of participants to get a second "bite at the apple," that likely cannot be implemented by rule. The Commission itself has indicated in the Request for Comment on the Consensus RTG proposal that it "may contain provisions which can only be promulgated by statute." The consensus RTG proposal was based on a delicate balancing of multiple interests. Some participants in the negotiations were able to accept certain requirements and provisions only in exchange for other provisions providing certain benefits. Because FERC likely cannot adopt the entire proposal without change, any rule that the Commission does propose to implement will likely not contain all of the elements that were necessary for consensus among all the disparate interests. And without such consensus, some classes of participants may be discouraged from joining RTGs, thus precluding the benefits of effective RTGs which the Commission seeks.

As indicated above, there are substantial uncertainties about the scope of FERC's authority regarding RTGs. First, there needs to be greater certainty about the scope of FERC's authority over participants which, absent section 211, would be non-jurisdictional under Part II of the Federal Power Act. Second, there needs to be greater certainty as to how the Commission would apply the substantial deference and rebuttable presumption standards, if it chooses to apply them at all. Finally, the Commission needs to articulate in considerable detail the reasons why RTGs achieve the pro-competitive goals of the Act as well as other Federal laws regarding competition, in order to minimize the potential for extensive litigation that could deter RTG formation and preclude RTGs from achieving their full potential benefits. Before proceeding much further with the RTG concept, it may be useful for the Commission to conduct, and make available for comment, its own assessment

of these issues, and others mentioned in these comments. This assessment might also address the limits of an RTG's role in addressing pricing and equity issues. Such an assessment would provide additional certainty to groups currently under formation in the absence of a policy statement or rule.

While RTGs represent an important option for implementing the objectives of the Energy Policy Act, we do not believe that the development of a detailed rule is the best way for FERC to proceed. What is more important, as discussed below, is that regional groups have some certainty that after going through all the time consuming and complex activities that will be needed to form RTGs, they will not be rejected simply because they do not meet some pre-conceived notion of what an RTG should look like. Furthermore, a detailed rule is not necessary to provide the certainty that regional groups might desire when they file their proposed governing agreements with the Commission.

C. If FERC Decides to Proceed With Developing Rules, it Should Use Negotiated Rulemaking Process

While we do not believe that the Commission should develop a detailed rule to implement the RTG concept, if the Commission believes that it can and desires to implement the consensus RTG proposal by rule, we would recommend that a negotiated rulemaking process be utilized, so as to allow all interested parties that may be participants in RTGs the ability to have input in the rulemaking process. There is both statutory authority and precedent for utilizing a negotiated rulemaking in cases similar to this[22]. A negotiated

[22]See Negotiated Rulemaking Act of 1990, 5 U.S.C. Sections 581-590, redesignated Sections 561-570 by the Administrative Procedure Technical Amendments Act, P.L. 102-354, 106 Stat. 944, approved August 26, 1992. Negotiated rulemakings have been used by the Environmental Protection Agency (e.g., Final Rule on Asbestos-Containing Materials in Schools, affirmed Safe Buildings Alliance v. EPA, 846 F. 2d 79 (D.C. Cir. 1988)), the Department of Transportation (e.g., Response Plans for Onshore Pipelines, 58 Fed. Reg. 244 (January 5, 1993)), and the Federal Communications Commission (e.g., Mobile Satellite Service in the Frequency Bands Above 1 Ghz, 57 Fed. Reg. 39661 (September 1, 1992)),

rulemaking would be best in this case because ultimate implementation of RTGs will require consensus among all players within a region. Those same players should be involved in designing the requirements for RTGs if the concept is to be successful. If FERC decides to proceed with the development of a rule, a negotiated rulemaking may be the best way to ensure that the final result will be something amenable to all classes of potential participants in RTGs.

VI. FERC Should Develop a Policy Statement Encouraging RTG Filings

A. Benefits of a Policy Statement Approach

While we do not believe that the Commission should implement the RTG concept via detailed rule, we do believe that the Commission should provide some level of certainty to groups wishing to file a regional transmission group proposal with the Commission. Thus, FERC should provide a mechanism and minimum requirements via which such groups can file their charters or governing agreements and have those agreements accepted under the FPA. As noted in the legal analysis above, such regulatory oversight and approval can be achieved under Sections 205 and 206 of the FPA.

Furthermore, if the Commission is to be able to rely on decisions made within RTGs, it must be comfortable with the charter, membership rules and decision-making procedures of such groups. **We believe that developing a generic policy for filing, review and acceptance of RTG requests, with minimum requirements for such filings, while at the same time maintaining flexibility for multiple approaches, would be the most beneficial path to follow, and can best be accomplished through issuance of a Policy Statement.**

A policy statement containing minimum requirements for RTG acceptance and approval would provide both needed flexibility and certainty, so that organizations formed for

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among others.

different purposes could have some assurance that their filing would be accepted, without locking the Commission (or the industry) into a single model of an RTG. Through the policy statement approach we recommend, FERC would not be imposing any requirements on groups or binding itself to providing future benefits to such groups (by limiting its own authority or limiting any rights of RTG participants). Nonetheless, the Commission would be encouraging participation in RTGs by stating its intention to rely on RTGs (and give deference to their agreements and dispute resolution process results) wherever possible.

The assurance of some level of deference from the Commission, be it substantial deference or a rebuttable presumption as called for in the consensus proposal or some other level of deference, is one of the most critical factors to the potential success of RTGs. Potential participants will likely join RTGs only if such participation results in reduced regulatory burdens and decreased costs. If all RTG actions or dispute resolution processes are only a prelude to the same FERC regulatory proceedings that would have been required absent the RTG, many of the advantages to participating in such groups would be lost.

On the other hand, if groups understand that, by giving due process to members through fair and reasonable decision-making and dispute resolution procedures, the Commission will give substantial weight to group actions and dispute resolution results, without full blown litigation before the Commission, then there will be increased incentives to join the groups. Thus, it is important that the Commission pledge up front to provide as much deference to the decisions of such groups that it can when it reviews the RTG's Section 205 filing. While we recognize that a pledge by the Commission to provide such deference will not be binding, the reality is that the Commission, even under the consensus proposal, will provide only as much deference as it feels comfortable with in specific filings. Thus, it is even more important that as experience is developed with RTGs, the Commission indicates a willingness to defer to RTG actions or decisions that are reached through processes previously approved by the Commission. Again, such experience will send a signal to potential participants in other regions regarding the potential benefits of regional transmission groups.

B. The Proposed Contents of a Policy Statement

The policy statement that we propose[23] would encourage the formation of RTGs by stating that as a matter of policy, the Commission will (1) consider any filing made by such groups under the Federal Power Act, and (2) approve such groups for which the filed information is sufficient to determine that the group will operate within the boundaries of the Federal Power Act and other applicable laws.

Specifically, the policy statement would further encourage RTGs by stating that while any transmission group approach that facilitates meeting the Federal Power Act's and Energy Policy Act's objectives within statutory requirements will be favorably considered, the Commission intends to provide certain benefits to RTGs meeting certain minimum criteria. The level of benefits to be conveyed would be tied directly to how comfortable the Commission is in "promising" deference to a group's activities. Groups not meeting any of the minimum criteria, but providing valuable services and within legal boundaries, could still be accepted by the Commission, but without any promised benefits. Groups partially meeting the minimum criteria would get a lesser level of benefits, as the Commission would specify in our proposed policy statement.

C. Proposed Minimum Criteria and Associated Benefits

In order to qualify for the full benefits that the Commission can offer (described below), the Policy Statement would require that RTGs meet the following qualifications:[24]

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[23]We would recommend that FERC first issue a draft policy statement, giving all interested parties an opportunity to comment on the draft before proceeding to a final policy statement.

[24]While these minimum criteria (and associated benefits) are based on the consensus proposal, they have been modified based on the criteria that we believe the commission could legally require and the benefits that the commission could legally grant.

1. Membership must be of a sufficient size and scope to provide transmission services consistent with the requirements and objectives of Part II of the Federal Power Act and Title VII of the Energy Policy Act.

2. The RTG must establish governing agreements and decision-making procedures that are just, reasonable, not unduly discriminatory or unduly preferential, and otherwise consistent with the FPA and the public interest.

3. Participants must agree to provide transmission services to other participants on a basis that is consistent with Sections 211 through 214 of the Federal Power Act, including an agreement to build new capacity when needed to provide requested service -- provided that (1) inability to obtain all required local, state, and federal permits, approvals, and property rights for expansion or upgrades (after a good faith effort) will relieve a participant of the obligation to provide service requiring such expansion or upgrades; (2) the provision of such services would not unreasonably impair the continued reliability of electric systems affected by the order, as provided for in Section 211(b) of the FPA; and, (3) native load customers of transmitting utilities are protected from economic harm, consistent with Section 212(a) of the FPA.

4. Participants must agree to coordinate transmission planning and share appropriate transmission planning information (on request) to help ensure that the needs of all participants are dealt with reasonably and efficiently, unless the RTG agrees to rely on other mechanisms available to all participants for such coordination and information sharing.

5. Participants must agree to conform with the applicable reliability criteria and guides of the North American Electric Reliability Council and the appropriate regional electric reliability councils, and with any other reliability criteria and guides developed by the RTG that are consistent with the NERC or regional criteria and guides.

6. The RTG must have at least one dispute resolution process, deemed by the Commission to provide due process, and to be fair and equitable, to all participants. The RTG may provide that any issue with respect to administering the approved governing agreement and related filings be addressed through the dispute resolution process, provided that parties may go directly to the Commission on issues of policy not addressed in the approved governing agreement or related filings. The RTG must have a reasonable time limit on the resolution of disputes, after which any of the participants could bring the dispute to FERC for resolution.

RTGs meeting all of the above qualifications to the Commission's satisfaction would be provided the following benefits, which we believe are those which could be conveyed without new statutory authority:

1. The Commission would pledge to give considerable deference to any elements of transmission service agreements or tariffs filed under Section 205 that result from agreements among participants reached without dispute or decisions reached via a dispute resolution process which the Commission had previously approved when it accepted the Group's initial RTG filing.[25]

2. Where the Group's dispute resolution process is considering a dispute among members, and a participant in that dispute resolution process has applied for a Section 211 order, the Commission would pledge to defer issuing any order until the dispute resolution process has either resolved the dispute or reached the reasonable time limit specified in the Group's initial filing.[26]

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[25]While the Commission could not legally bind itself to giving deference to elements of future filings, our proposal is that the Commission make it clear, via a Policy Statement, that if it is satisfied with the process by which a decision was reached, it is likely to give deference to such decisions, as it typically has in the past with settlement agreements.

[26]While an RTG participant cannot legally be precluded from seeking a wheeling order under Section 211, the Commission could treat the RTG's dispute resolution process in the same manner that it treats settlement conferences -- allowing parties time to resolve disputes

3. Where an RTG member appeals the result of a dispute resolution process in which it was involved to the Commission, protests a filing based on that result, or seeks a Section 211 order inconsistent with the result, the Commission would provide an expedited proceeding to address the complaint or request, with a heavy burden of proof on the complainant to demonstrate why the result is unlawful and therefore subject to modification by the Commission.[27]

We believe that all of the above benefits can be conveyed to RTGs absent legislation.

D. Other Issues to be Resolved

One issue that we are unsure that the Commission can deal with either by rule or policy statement is the treatment of federal entities. Particularly if a group adopts binding arbitration, federal entities (PMAs and TVA) may require statutory authorization to participate in an RTG. There are other questions about how transmission service rates, terms and conditions of such entities would be handled.

A related issue is the treatment of foreign entities (Mexican and Canadian) that may wish to participate in RTGs. As the Commission is aware, both Mexican and Canadian utilities are interconnected with U.S. utilities, and many already participate in NERC and its Regional Reliability Councils. Because FERC has no regulatory jurisdiction over these utilities, there may be questions as to how actions of RTGs could be enforced with respect

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prior to issuing an order.

[27]As stated in the legal analysis above, the Commission likely cannot, by rule, preclude parties from protesting the results of a dispute resolution process. The Commission may be able, however, to make it clear that if a party voluntarily agreed to the process beforehand, and then complains about the result, it will have a heavy burden of proof to get the result modified.

to non-U.S. entities. FERC may wish to address this issue in the context of the policy statement that we propose.

Finally, the Commission will need to ensure that all current state regulatory authorities and responsibilities are maintained, as provided for in the Energy Policy Act. We believe it is important that the Commission address in its policy statement how it will incorporate pertinent state decisions in its own regulatory actions. Unless states are comfortable that their role is not diminished by the formation of RTGs under a FERC regulatory umbrella, they are unlikely to support participation by jurisdictional utilities, lessening the potential success of the concept.

VII. Summary and Conclusions

EEI believes that voluntary regional transmission groups represent an important option for meeting the goals of the Energy Policy Act for efficient, technically reliable and competitive bulk power markets. The mandatory access provisions of that legislation present many difficult issues which we believe are best addressed at the local and regional level by those with the specific expertise to address issues and disputes that may arise. The regulatory process at the FERC, along with FERC's lack of experience in dealing with the types of issues likely to arise, do not lend themselves to easily addressing transmission service issues. RTGs, properly constituted, can represent a more efficient, technically accurate, and less costly way to resolve disputes.

The best way for FERC to encourage the development of beneficial RTGs is to provide for flexibility in approaches, so that individual regions can negotiate RTG agreements that best meet the needs of potential participants. Developing a detailed RTG rule would result in a single model which RTGs would have to satisfy. Such an approach could result in discouraging potential participants in RTGs that may have concerns with alternative interpretations of the detailed rules.

On the other hand, we do see the need for the Commission to indicate what it considers to be the minimum criteria necessary for an RTG to obtain potential benefits which the commission can convey. We believe that the necessary flexibility and certainty can best be achieved through the issuance of a policy statement that sets out such minimum criteria and the specific potential benefits available to groups meeting those criteria.

If the Commission does decide to develop a detailed rule regarding RTGs, we believe the best means would be to utilize a negotiated rulemaking involving all potential stakeholders. In that way, there would be the ability to try and retain a consensus on the RTG concept in the context of a rule, rather than legislation. But again, we do not believe that a detailed rule is either necessary or desirable.

We appreciate the Commission's interest in seeking public comment on the consensus RTG proposal, and we look forward to working further with the Commission as it considers its own role in furthering the RTG concept.

Respectfully Submitted,

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Mr. SYNAR. Thank you.
Ms. Hull.

STATEMENT OF B. JEANINE HULL, VICE PRESIDENT, ENVIRONMENTAL AND REGULATORY AFFAIRS, LG&E POWER SYSTEMS, INC., ON BEHALF OF THE ELECTRIC GENERATION ASSOCIATION

Ms. HULL. Thank you, Mr. Chairman.

The independent power industry is going to say very much the same thing as the EEI. I am very glad for that.

My name is Jeanine Hull. I am vice president of LG&E Power Systems Inc., and I am a vice chair of the Electric Generation Association, which is a trade association of independent power producers.

As one whose company and trade association worked tirelessly on the Energy Policy Act last year, I am grateful that this subcommittee, through this hearing, has expressed its ongoing interest in that act and its intent to ensure that the Congress' goals will be met as the act is implemented.

I am pleased to report that as of this date the independent power industry is reasonably pleased and comfortable with the efforts of the responsible agency, the Federal Energy Regulatory Commission, to meet the spirit and the letter of that law.

Particularly, we are pleased with the willingness of the Commission to allow experimentation and innovative proposals to flourish in response to this new authority.

For example, the Commission could have viewed the RTG proposal, which you championed last year as some States did, which was a challenge to its ability to command and control the developments in the emerging competitive power markets. Instead, and much to its credit, it immediately seized upon the potential value of the idea to facilitate further developments in the competitive marketplace.

Indeed, FERC seems willing to work with the regulated industry to develop workable transitions and responses to many of the issues that will result from the evolution taking place—within, I might add, reasonably well-understood parameters. We believe this approach will minimize the disruption and the cost that always accompanies the type of transition the electricity is currently experiencing.

I hope Congress will continue to allow FERC the flexibility it needs to continue to explore satisfactory solutions to many of these very technical and complex issues.

I want to focus on two out of nine questions, all of which are very important to the industry, but two of which I think have particular interest to the independent power industry.

You asked about FERC's use of policy statements, case-by-case determinations, and rulemakings. We are very concerned about FERC's ability to move rapidly to respond to changing conditions in the marketplace, to provide timely and prompt response to proposals that are brought before it.

We think that the case-by-case decisionmaking that FERC has been engaged in is perfectly appropriate for this. It allows the issues to mature to the degree that, after a while, they become ame-

nable to rulemakings. But right now, with so much change, it is really hard to predict where we are going to be in a couple of years so that one can establish the finality and the stability of a rulemaking.

I think that during this period of change and evolution, case-by-case determinations are exceptionally important. And policy statements which give an idea of where FERC is headed, what they want to see, how they want to see things develop, that also say "We are not stuck in concrete on this; let's see how it works," I think are very appropriate approaches, and I am glad to see FERC making use of this type of regulatory flexibility.

With respect to RTG's, regional transmission groups, EGA supported your legislative proposal last year. We believe that RTG's, if properly formed, can achieve substantial benefits such as fairer and faster transmission access to all parties, a more efficient siting of new and expanded transmission capacity within a region, not just within the small service territory of one company, and also will promote the resolution of the complex technical and financial issues that result in the changes—from the changes in the rest of that act.

The Energy Policy Act fundamentally recognized that—well, Congress recognized in the Energy Policy Act that some transmission owners currently use their ownership and control of the lines to inhibit competition. Therefore, the Energy Policy Act separated ownership from control by authorizing FERC to stand in when necessary on the control and use of those lines to minimize the ability of some owners to inhibit competition.

It is clear that either industry or government will fill the control role. As I said, the Energy Policy Act gave FERC the authority to fill that role. We believe that RTG's will give the industry the opportunity to work these issues out themselves within the framework established by FERC and, very specifically, with the oversight and regulation by FERC.

In short, I think that FERC has been doing an excellent job, and we certainly support their efforts in promoting competition in the bulk power markets.

[The prepared statement of Ms. Hull follows:]

ELECTRIC GENERATION ASSOCIATION

Statement of B. Jeanine Hull

Vice President, Environmental and Regulatory Affairs

LG&E Power Systems Inc.

on Behalf of the Electric Generation Association

Before the Subcommittee on Environment, Energy and Natural Resources

Committee on Government Operations

August 6, 1993

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Mr. Chairman and Members of the Subcommittee, my name is Jeanine Hull, and I am Vice President for Environmental and Regulatory Affairs for LG&E Power Systems Inc., an independent power producer. I also serve as Vice President of the Electric Generation Association ("EGA"). Thank you for your invitation to appear before you today on behalf of the Electric Generation Association to discuss the electricity program of the Federal Energy Regulatory Commission ("FERC"), or the "Commission."

The Electric Generation Association is a national trade association representing independent power producers (IPPs) and suppliers of goods and services to the competitive wholesale electric generation industry. Our companies represent a dynamic and fast-growing industry that in 1992 accounted for over two-thirds of all new electric generation capacity brought on line in the United States. Our members provide their utility customers, and hence the general public, with safe, low-cost, environmentally sensitive, and reliable wholesale electricity.

FERC Statutory Authority --

The Federal Energy Regulatory Commission is the Federal regulatory agency that governs the rates of independent power producers, unless exempted by the Public Utility Regulatory Policies Act of 1978 (PURPA). PURPA was enacted in part to promote the development and use of renewable energy and energy efficient technologies in "qualifying facilities" (QFs). FERC is responsible for processing applications for these QFs -- the first true IPPs. With the Commission's responsibility to regulate the rates, terms, and conditions for the sale and transmission of wholesale electric power in interstate commerce under

the Federal Power Act (FPA), the policies and decisions of the Federal Energy Regulatory Commission are at the very heart of today's independent power industry.

In addition to the two statutes mentioned above, the Energy Policy Act of 1992 has charged FERC with significant new regulatory responsibilities. It presents electric generators, utilities and IPPs alike, with numerous challenges and opportunities. The Energy Policy Act amended the Public Utility Holding Company Act (PUHCA) and the Federal Power Act to substantially alter the topography of the electric industry. In the view of IPPs, these changes will be beneficial. The changes to PUHCA widened the once-narrow field of electric generators by creating a new class of independent power producers, called "exempt wholesale generators" (EWGs). The FPA amendments broadened the authority of FERC to order utilities to provide transmission services. All of these changes incorporate and encourage the growing national trend toward reliance on competitive markets to discipline the rates of the electric generation industry. The result should be more efficient and lower cost electric power for the ultimate customer.

Since the goals of PURPA, to promote renewables and energy efficiency, and the Energy Policy Act, to promote competition and regional efficiencies, are dissimilar but non-conflicting, EGA has no position on amending PURPA at this time.

Required Actions under the Energy Policy Act --

With regard to FERC's electricity program, the Energy Policy Act has, without question, commanded a significant amount of the Commission's time since its passage. The Commission has met its statutory deadline for issuing a Final Rule on the process of approving applications for EWG status, establishing ministerial procedures and setting forth guidelines that minimize the need for Commission scrutiny. In general, comments made by EGA to the Commission on EWG applications were well received, and we are pleased with the Final Rule, which appears to be working as intended. To date, FERC has received 62 EWG applications and acted on 55 of those, all within the required 60-day time frame.

Late last year, FERC issued a Request for Public Comment on a consensus proposal for the establishment of regional transmission groups (RTGs). EGA filed comments with the Commission supporting the concept of RTGs and outlining several important components of an RTG policy framework based on voluntary agreements that seek consensual resolution of transmission issues and coordinated planning. While under no statutory requirement, the Commission last week issued a final policy statement on RTGs, setting forth seven basic components. The Commission specifically cited EGA's support of several of these components, including 1) broad membership, 2) development of coordinated regional transmission planning, and 3) the use of voluntary dispute resolution as a first resort.

In March, the Commission issued the Energy Policy Act-required Notice of Proposed Rulemaking (NOPR) outlining information to be supplied by

transmitting utilities on available transmission capacity and constraints. EGA submitted comments supporting the proposed rule while suggesting several modifications, including 1) biannual review of the information regulations, 2) exemption of IPPs from Form 715 filing requirements, 3) requiring information from the Tennessee Valley Authority (TVA), 4) specifying a contact person for transmission requests, and 5) identification of regional organizations that can file information on behalf of a respondent. We understand that the Commission is in the process of reviewing the numerous comments received on this NOPR.

The Commission has pending two proceedings of interest to IPPs. Comments on a July policy statement outlining what constitutes a "good faith" request for transmission services and a "good faith" response thereto will be accepted until August 20. EGA believes that the use of open, non-discriminatory transmission services should be the basis of any "good faith" policy, and we will be filing detailed comments with the Commission to that effect. In addition, the Commission is seeking comments on its transmission pricing policy and has announced its intent to conduct a technical conference to discuss transmission pricing policies after it has reviewed the requested comments. EGA will base its comments on transmission pricing on the overarching principle that FERC's policy must meet the goals of the Energy Policy Act, to promote both competition in the bulk power markets and the efficient use of transmission and generation facilities on a regional basis.

Commission Implementation of the Energy Policy Act --

In assessing the Commission's implementation of the Energy Policy Act to date, EGA is encouraged by both the progress the Commission has made and the direction of its stated policy. EGA notes that the EWG rule was issued well ahead of schedule, despite a change in administration and the pending departure of several Commissioners. We are not aware of matters that are suffering from a lack of FERC staff at this time.

EGA also is pleased with what we view as a relatively predictable and responsible economic philosophy at the Commission -- a philosophy to promote competition in bulk power markets, consistent with the Energy Policy Act. We have seen this philosophy maintained through the recent transition at the Commission, and we hope competition will continue to be the driving premise in FERC's future decisions and rulemakings.

With regard to FERC's handling of evolving electricity policy issues, EGA believes that the Commission's use of notices of inquiry and policy statements is appropriate and provides the flexibility necessary in a changing environment. In addition, FERC's tendency toward case-by-case decisionmaking on electricity policy issues recognizes the evolution of the industry and has permitted experimentation and flexibility within certain boundaries that promote the smooth transition from government to market-based controls. For example, in the matter of market-based pricing, over 50 cases have been filed since the early 1980s. Had FERC issued a formal rule early on, rather than acting on a case-by-case basis to requests for market-based pricing, EGA believes that innovative pricing approaches by industry would have been discouraged or prevented. FERC

could not have kept pace with the changes that the industry was undergoing. The case-by-case approach allowed the industry and its regulators to find an approach that provides the optimal balance of reliance on market prices and governmental oversight. As FERC has recognized, its market-based pricing policy is now sufficiently mature to make a rulemaking appropriate.

While FERC has yet to promulgate a rule on market pricing, we note that the lack of a formal rule on this issue has not prevented transactions from occurring or policy from being developed. EGA also believes that the use of case-by-case decisionmaking by FERC has not prevented our member companies from intervening in any case in which they have an interest.

In a related matter, the use of prefiling conferences with Commission staff has been helpful to companies that need or seek guidance in understanding the requirements of highly technical regulations. EGA sees no benefit to public notice of such prefiling conferences, but I cannot speculate on whether EGA would formally support or oppose such a rule.

Opportunities for the Commission --

While EGA believes that FERC is making great progress in implementing its requirements under the Energy Policy Act, there are a number of issues that were not addressed by that statute that have been raised as potential opportunities for improvement. EGA believes that improved communication between FERC, the National Association of Regulatory Utility Commissioners (NARUC), and state commissions would reduce conflicts in Federal / state

jurisdiction over electricity regulation. We understand that Chair Moler and NARUC officials are making progress on this front. That said, however, a certain amount of tension is to be expected between state and Federal regulators. States have a much smaller constituency and area of interests, and cannot be expected to care as much about regional or national efficiencies as they do about state-wide efficiencies. This issue is not likely to disappear entirely so long as the jurisdictional boundaries between state and Federal regulation remain unchanged.

EGA does not see the need for another National Power Survey, since the major issues affecting our industry already have been identified.

While EGA has members who are affiliated with utility holding company systems and thus regulated by the Securities and Exchange Commission (SEC) under PUHCA, EGA has no position on legislation that would transfer SEC jurisdiction of PUHCA to FERC.

Regarding the recently released report to the Chairman by the General Accounting Office entitled, "Electricity Regulation -- Factors Affecting the Processing of Electric Power Applications," EGA agrees with the report's conclusion that FERC is generally well-managed and efficient with respect to processing its cases. We especially agree with the report's recommendation that the Commission expeditiously adopt a policy, as required under the Administrative Dispute Resolution Act, allowing the use of alternative settlement procedures to speed the processing of FERC applications, especially non-routine applications that can be resolved without trial-like proceedings.

Conclusion --

The Electric Generation Association recognizes that the Federal Energy Regulatory Commission is faced with increasing responsibilities in a changing electric power industry environment. We applaud the Commission for its reliance on an overall philosophy that fosters competition in bulk power markets and for the steps it has taken to promote competition in the electric wholesale markets. We trust the Commission will be consistent in its support of a competitive power market in future proceedings.

The independent power industry will be well served if the Commission proceeds with its electricity restructuring agenda. EGA looks forward to participating in this historic time of evolving state and Federal policies toward the electric industry. In fact, EGA is very excited about the new Commission and looks forward to working with Chair Moler, the new Commissioners, and their staff. Finally, Mr. Chairman, EGA appreciates the opportunity to discuss these important issues today with you and the Subcommittee. I will be happy to respond to any questions.

Mr. SYNAR. Thank you very much.
Mr. McDiarmid.

STATEMENT OF ROBERT C. McDIARMID, PARTNER, SPIEGEL AND McDIARMID

Mr. MCDIARMID. Thank you, Mr. Chairman.

I would like to start off by saying the views I express are my own and only my own. I am not appearing for anybody else today.

Mr. SYNAR. Your clients are protected.

Mr. MCDIARMID. Thank you, Mr. Chairman. They would appreciate that, I am sure.

The second thing I would like to say is that I have asked leave to substitute a copy of my text which corrects some typographical errors, only one of which is egregious, but is sufficiently egregious that I call your attention to the fact that on page 13 there is—I am quoting an order of the FERC. I quoted in such a fashion that it appears that they gave 1 year and 6 days' notice, when in fact what I was complaining about was that there was only 6 days' notice. That is corrected in the copy which I have asked be submitted.

Mr. SYNAR. We will correct that.

Mr. MCDIARMID. Thank you.

The important thing here, I think, is that the FERC is doing considerably better. I think all practitioners—and this panel is composed of practitioners—are of the view that the FERC, the new FERC, has undertaken a batch of steps which ought to reduce the workload, shorten the time that is going to be involved, and generally improve the regulatory process. They are doing this by a series of policy statements, notices of inquiry, and rulemakings.

The reason that this is important, I think, is because the big hangup, the gigantic cases that used to occur and used to wildly skew the data that you have seen over the years on how FERC takes forever to do things, were in cases where there was a basic disagreement on policy within the Commission, and the Commission could not find either the agreement or the courage to resolve those disputes. What they are doing now with the additional ability that they have under the Energy Policy Act, is to make clear some basic guidelines which ought to permit an awful lot of the parties to resolve things outside the 211 context.

A number of cases already have switched from what were incipient 211 cases, to cases where the companies involved decided that it was to their advantage to go ahead and preempt the process and file a rate under 205, which brings the question simply down to a question of, in their view at least, rate, and makes it a lot easier for the Commission to deal with it.

You don't have to tell me I have to start concluding. I am going to conclude at this point.

Thank you.

Mr. SYNAR. You do this, and you are going to be invited back.

[The prepared statement of Mr. McDiarmid follows:]

PREPARED TESTIMONY OF ROBERT C. MCDIARMID

Before the

U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON ENVIRONMENT, ENERGY AND NATURAL RESOURCES

COMMITTEE ON GOVERNMENT OPERATIONS

Mr. Chairman and Members of the Committee:

I am Robert C. McDiarmid, a partner in the Washington, D.C. law firm of Spiegel & McDiarmid. I appreciate the opportunity to be here today to discuss the issues you have raised concerning the FERC's electricity program.

My law firm and I represent cities, state joint action agencies, REA cooperatives and states in proceedings before the FERC, and we were actively involved on behalf of the Transmission Access Policy Study Group (TAPS – a group of such cities and cooperatives) in the legislative proceedings which culminated in the Energy Policy Act of 1992 ("EPACT"). The views expressed today, however, are my own, and not necessarily those of any client or of my partners.

Prior to joining what later became Spiegel & McDiarmid in 1970, I had spent some time representing the United States while employed by the Department of Justice, and the predecessor to the FERC, the old Federal Power Commission, as Assistant to the General Counsel. I hope that I appreciate the practical problems of operating an agency such as the FERC from the view of a regulator as well as from the view of a practitioner.

I have practiced before the FERC and the FPC (as well as in the Courts and before other agencies) for more than twenty years, representing a multitude of clients. As a FERC practitioner, for example, I represented the entity whose case was excluded from the GAO analysis (as noted at page 46) because the nearly twenty year length of time it had taken would otherwise skew the results. There are no doubt other reasons why FERC would wish to have that case forgotten.

The hearing is based upon the GAO's July 1993 Report to the Chairman of this Committee, Electricity Regulation, and you have identified a series of topics related to that report in your invitation to appear this morning.

Prior to turning to the specific issues you have identified, I should note that that FERC has undergone a massive change in membership, with four of the five Com-

missioners having taken office very recently, and the Chair having been assumed by Commissioner Moler only in that same time frame. Thus many of my comments will relate to what may legitimately be thought of as "ancient history," even if the matters at issue are only a year or so old. It does appear that the new Commission has attempted to extend some of the procedural initiatives of the old Commission in ways which may be productive of a more expeditious resolution of disputes. Similarly, the new Commission has taken some tentative steps which seem likely to improve the Commission's reputation for fairness, which I spell out in more detail below. While only time will tell how this will work out in practice, I can say that we are hopeful. Nonetheless, practitioners may offer some opinions on the likely results of these changes, and as to the remaining issues raised in your invitation, treating past as prologue.

SPECIFIC TOPICS RAISED IN INVITATION TO APPEAR

You have asked for comment on a number of fairly specific issues. I address these sequentially:

1. **THE USE OF CASE-BY-CASE DECISIONMAKING INSTEAD OF MORE GENERAL RULEMAKING TO DEAL WITH BROAD ISSUES AND CLASSES OF CASES AND WHETHER THIS TECHNIQUE DENIES PARTIES THEIR DUE PROCESS RIGHTS.**

The problem for all regulatory commissions is that issues are brought to them in the context of specific disputes. Very few such disputes are likely to have all related issues of interest to a national commission within the case framework; each such dispute, however, will be of significant importance to the parties, and potentially of significant import to the industry as a whole. The basic structure of the Federal Power Act makes the FERC the agency which must resolve many of these questions. Unless the Commission is using cases consciously to make policy statements in areas unrelated to the basic disputes, the Commission must resolve the questions as they are brought to it.

This resolution of issues must be done either in the framework of the case brought to it, or in the context of a rulemaking, but it must be done. Parties to a particular case must not be required to wait a later rulemaking which is not promptly begun and promptly completed. The issues involved in FERC proceedings are significant to society, but they are even more significant to the parties, who frequently must have a resolution in order to continue to do business.

I believe that it is unrealistic to expect that FERC can, or even should, work out all major issues by rulemaking. Nor is it necessarily good government prac-

tice to expect it to do so. Rulemakings frequently take place in a relative vacuum of information, especially if they are done before there is some experience with the real problems involved. The proponents of rulemakings are too often, historically, those companies which have the information, are well financed, and which are set up to complain that the "sky is falling." Historically, the most frequent purpose of those who have sought such rulemakings was to seek ways to obtain higher revenues from the customers. Those who pay the bills, however, are rarely sufficiently organized to respond adequately, nor (often) do they really know all of the implications of the result sought.

Thus rulemakings done before some experience is gained by the Commission tend to be an inadequate remedy for the real problems. While case-by-case decisionmaking is not the ideal way to resolve issues of broader import, it may be the only way in which the Commission can get adequate and in-depth information as to the real problems.

The question as to due process rights is a more difficult one. While parties to a particular case have, of course, full rights to appeal and full due process rights at the hearings (assuming that the Administrative Law Judge presiding does not seek or feel instructed to limit the hearing improperly), the problem is as to non-parties whose rights may be affected by the precedent. While FERC tends to analogize to the practice in federal courts, the problem is that almost every decision of FERC is, and should be, a part of a "seamless web" of precedent which is intended to provide guidance to the parties to many other disputes. If many cases are viewed as potentially precedential, however, the risk is that too many persons will seek to intervene to permit the management of a reasonably expeditious hearing.

These issues may be fairly viewed as questions of how the Commission can properly obtain information upon which to base its judgments. The problem is that a regulatory agency has elements of being both a judge and a policy maker. Every Commissioner I have known has always chafed at the restraints on information acquisition which inherently arise from the decision making function when an on-the-record decision is required, and the consequent ex-parte rules. Every Commissioner attempts to deal with this problem by attending industry functions. This is a normal reaction, but one which necessarily exposes the Commissioner to "lobbying" (even if all participants stay away from issues directly involved in pending cases – which assumes that all participants have perfect knowledge of the FERC docket) by the people to whom she or he talks. More industry functions are put together by the people with more resources than are put together by the people with fewer resources. Thus each Commissioner may be assumed to have a somewhat skewed set of data presented to her or him. Some Commissioners recognize this skewing, and those who

have had previous experience with the industry tend to have an idea, at least, of where "the bodies are really buried."

I cannot say that there is a perfect solution to this problem; indeed, I am pretty sure that there is not. Completely "judicializing" the process so that Commissioners only looked at the record before them for all purposes, and ceased significant social contact with the parties before them or who are likely to be before them, would make rulemaking concepts much less effective.

Nor would the concept work of extending the judicialization process to the Commission's staff even more than it now is. For in an industry in which changes are rapidly occurring, the cases which come before the Commission are almost always those in which disputes have arisen in the past, and these do not necessarily offer complete guidance for the future.

2. THE USE OF NOTICES OF INQUIRY AND POLICY STATEMENTS INSTEAD OF RULES AND WHETHER THIS TECHNIQUE CREATES A HARDSHIP FOR UTILITIES, CUSTOMERS AND INDEPENDENT POWER PRODUCERS WHO THUS CANNOT CHALLENGE SIGNIFICANT NEW POLICIES OF THE COMMISSION.

It is not clear to me that there is a problem with being able to challenge the results of Notices of Inquiry or a Policy Statement. The results of a Notice of Inquiry will ordinarily surface either as a Rulemaking or in a litigated case. Either affords the remedy of an appeal. A Policy Statement must be applied on a case by case basis. If the Policy Statement is not construed by the Courts as a rulemaking, it can be challenged when applied in a case.

3. ANY PROPOSALS OR APPROACHES WHICH YOU BELIEVE WOULD IMPROVE THE PROBLEMS ARISING OUT OF THE SPLIT FEDERAL/STATE JURISDICTION OVER ELECTRICITY REGULATION, ESPECIALLY IN LIGHT OF THE ENACTMENT OF EPACT.

The current problems of split Federal/State jurisdiction do not stem from the enactment of EPACT, but from the evolution of the industry. With all due deference, a major concern of many state commissions is one which seeks the sort of review capacity which can no longer exist.

State commissions see control of the most significant items of the cost of service of utilities whose retail rates are within their jurisdiction slipping away, as more and more utilities buy more and more power at wholesale. As the GAO report

points out (at pp. 16-17), the Department of Energy has reported that purchases of power by utilities from non-utilities has been increasing since 1986 at a average annual rate of 31 percent, and electricity sold in wholesale transactions now accounts for more than half of the electricity now sold to ultimate retail consumers.

These changes result from the changes in the industry following the 1978 enactment of PURPA; they do not stem from the enactment in 1992 of EPACT, although the modifications encouraged by EPACT should serve make the entire process more efficient and thus further accelerate the process. EPACT encourages the development of an efficient market in generation resources, largely to be governed by competition rather than case by case cost of service regulation.

For the short term portion of the generation market, the idea of cost of service regulation is a contradiction in terms. For a sale of power for one hour, one day, one week, or one month (unless the sale is massive) ought not to be sufficiently profitable to sustain the cost of a FERC filing and hearing. Even more significantly, these sales could not be reviewed in time to permit them to occur, since they tend to develop within days or hours of the time they are to take place.

Even more significantly, most of these sales (both long and short term) do not take place with both buyer and seller within the same state, at least where there is adequate transmission availability. Unless there is an identity of jurisdiction between seller and buyer, the concern as to loss of state regulatory capability could not be met even if the FERC were able to waive its own jurisdiction.

Congress, in EPACT, provided state commissions with an alternative tool for dealing with the regulation of total generation costs which is consistent with the move toward the market control of generation sales model that was implicitly endorsed by that Act. That tool is the Integrated Resource Planning ("IRP") test which each state commission must consider, as a result of the amendments to PURPA added by § 111 of EPACT. If state commissions are willing to move from the historic "command and control" thinking to an after the fact review of efficient operation with penalties and rewards to be associated with poor or good performance, they can obtain control of the contracting by utilities on an after the fact basis quite effectively, and can thus substantially lower the risk of having rates driven by "daisy chains" or "I'll buy your overpriced power if you'll buy mine" operations by utilities with "non-regulated" EWG subsidiaries.

The problem is that the state legislatures have not always granted the state commissions the full powers necessary to use that tool. It may be that the complaints to Congress are addressed to the wrong forum.

Unless the entire idea of an efficient market for generation is to be abandoned in favor of the old concept of letting each utility build all of the generation resources it needs, and only for itself, the state commissions will necessarily lose functional jurisdiction over some aspects of the purchases. They will, however, have the option of retaining a major role in supervision or review of the operations of the utility within the new market context. That is not necessarily bad.

4. YOUR OPINION OF THE FEASIBILITY AND DESIRABILITY OF USING REGIONAL TRANSMISSION GROUPS (RTGS) TO DEAL WITH TRANSMISSION ACCESS ISSUES. PLEASE INCLUDE DISCUSSION OF PLANNING, PRICING, COORDINATION, TERMS OF ACCESS, SCHEDULING, HARMONIZATION WITH STATE REGULATIONS, ELIGIBILITY FOR MEMBERSHIP, THE STATES' ROLE AND DEFINITION OF REGIONAL GEOGRAPHIC SCOPE.

FERC has just gotten out its policy statement on these issues, Policy Statement Regarding Regional Transmission Groups, issued July 30, 1993, in Docket No. RM93-3-000. While this policy statement does not adopt all of the elements which we had urged, it seems a pretty good start on the problem. The proof, however, will be in a review of what will actually happen under this Policy Statement.

It was, and is, our view that RTGs, if fairly and properly constituted, offer a good vehicle for dealing with transmission access issues in a manner which would cut down the burden on the FERC. The primary reason for our view is one which is driven by engineering concerns: a transmission system which takes into account the generation needs of all those who depend on the transmission grid is necessary to permit a market in generation services to develop in a meaningful manner. That, in turn, requires that there be joint planning of the transmission grid expansion and operation (in those areas where there are phase shifters or D.C. ties which permit the "operation" of the transmission system). Moreover, development of vigorously competitive generation markets requires that transmission owners and other users have access to the regional grid on the same basis (in terms of both cost and conditions of service).

The big risk from the RTG concept is that the owners of the transmission lines will get together to freeze out the users of those lines by pricing policies that impair the competitive position of the users, or otherwise skew the terms of access in favor of the owners.

The Policy Statement appears to be encouraging in its sensitivity to the need to structure RTG governance agreements to protect the interests of the less

powerful transmission dependent systems. Care must be taken, of course, to assure that the RTG concept does not develop into an anticompetitive "owners' club."

At least some earlier proposals would have functionally precluded the FERC from review of such pricing policies by binding participants in the RTG not to ever tell the FERC what the problems were, an effective "oath of silence." While FERC would, in theory, have been able to review all decisions, it would never have been able to be told what the problems were. Anyone familiar with the costs of service which are routinely filed at FERC knows that this would be akin to looking for the proverbial needle in the haystack. FERC may have provided for this in its Policy Statement by providing that the degree of deference it will afford to a dispute resolution process of a RTG will be affected by, inter alia, "whether a party can . . . object to the decision." We hope that this does not mean that the FERC will defer if a party, as a condition of joining the RTG, is precluded from objecting to FERC on review of the RTG decisions. That would be an outrageous abdication of power.

5. THE NEED FOR A NATIONAL POWER SURVEY.

This would not be a bad idea, but the industry is also in flux. A National Power Survey which focuses on where things are now would be hopelessly outdated within the next few years. If a National Power Survey were to be done, it should focus on where the industry is moving rather than on where it has been.

6. YOUR VIEWS REGARDING PROPOSALS TO TRANSFER JURISDICTION FROM THE SEC TO FERC SUCH AS HAS BEEN SUGGESTED BY SENATOR BUMPERS, OR OTHER APPROACHES TO THE OPCO PROBLEM.

I believe that the FERC and the SEC had the right position in the briefing of the OPCO case itself in the Supreme Court (Arcadia, Ohio, v. Ohio Power Co., No. 89-1283), and that that position on which the Commissions then agreed could easily be written into law again: FERC has jurisdiction over rates, while the SEC has jurisdiction over corporate structure. A full transfer of jurisdiction as proposed by Senator Bumpers would require that FERC acquire expertise which it does not now have; failure to make some change, as suggested above, would mean that the SEC would have to acquire expertise and enter into rate hearings which are now an accepted part of FERC responsibility and are handled with reasonable efficiency by that Commission.

7. THE PROPER ROLE OF THE PUBLIC UTILITY REGULATORY POLICIES ACT ("PURPA") AFTER THE ENACTMENT OF EPACT. SHOULD PURPA BE AMENDED?

The primary PURPA related issue that has arguably been an impediment to efficient operation of utilities and of the market is the combination of the "must buy" provision and the state commission set "avoided cost."

In principle, Congress chose a result in PURPA which could not hurt ratepayers: Utilities had to purchase power generated by "Qualifying facilities" or small power producers, but only at rates which met the avoided cost of such utilities. The "avoided cost" was to be set by the state commissions that had the primary responsibility to protect the ratepayers of the utilities which had to purchase.

The problem with that solution lay in the imperfections in the regulatory structure, and also in the paradigms accepted by some of the state commissions to whom the issue was initially presented. For example, in some of the more extreme cases, the avoided cost was set at something approaching the full cost of the nuclear plants that were then nearing completion at gigantic cost overruns. While it was true that those plants were being completed, the full cost of those plants drove some utilities into bankruptcy and threatened the financial stability of many more. Setting the avoided cost rate that high simply meant that the ratepayers were obligated to pay not only the greatly inflated cost of that plant (as it might be later reduced in "prudence" hearings) but also pay for that high cost over again in payments to producers who could build plants for far less than that artificial "avoided cost" benchmark. Sometimes the rules were set so that this occurred whether or not additional capacity was needed.

Several states now set avoided cost for this purpose by IRP competitive bidding rules. In that context, while the "must buy" provisions of PURPA create some artificial impediments to efficient operation of the market, those impediments are nowhere nearly as distorting as those that occurred when the commissions set the avoided cost rate by administrative procedures.

It may be time to consider whether the avoided cost should be determined by the IRP process of which EPACT requires consideration. The options lie anywhere from revoking the "must buy" provisions for those utilities which are found by the state commissions to be operating an adequate IRP process, to making the avoided cost determination something to be fixed by the IRP process rather than by state commission process, to amending the entire process out of existence as to all QFs and small power producers.

There are a number of public policy issues which are inherent in the choice of which of these options (or other like possibilities) to follow, should Congress determine that a change is needed. The considerations for wind power, for example, are not necessarily the same as those for the so-called "QF machine."

8. WHETHER FERC EMPLOYS A CONSISTENT AND PREDICTABLE ECONOMIC PHILOSOPHY IN DECIDING CASES WHICH PROVIDES UTILITIES OR INDEPENDENT POWER PRODUCERS WITH A GENERAL, ADVANCE LOOK AT HOW THEY MAY RULE.

The problem with this question is that there are a number of subtexts necessarily involved in the answer. In an industry in flux, FERC has recently been reasonably good at providing an advance look at what its thinking will be. That this is not necessarily "consistent and predictable" in full is at least in part a result of the fact that the industry itself is evolving, so the FERC's response to that evolution need also evolve.

FERC has, in recent months, sought to provide the "general, advance look" by its Notices of Inquiry and its Policy Statements. In a period of rapid change, I do not believe that this method of notification of the industry of changing thinking is an inappropriate approach.

9. WHETHER YOU THINK FERC WILL HAVE THE NECESSARY PERSONNEL TO CARRY OUT ITS EPACT MANDATES.

I fear that I am somewhat doubtful. On the other hand, if propérly handled, I do believe that many of the cases which FERC expects will be resolved without FERC decision, and perhaps without even a filing of a contested proceeding. There have been only a few such filings so far, and most of them have been out of the mainline.

Many proceedings that would have been filed have been settled, in whole or in part, following the enactment of EPACT. Part of the reason for this is the concern that unjustified refusal to provide transmission service is ground for significant penalty imposition. This in itself has led to agreements to provide the transmission service, but leaving disagreements as to pricing to be resolved subject to refund. If FERC is serious about requiring RTGs to ensure fair treatment of all transmission users, many more cases may be resolved in RTGs, outside the FERC litigated context. Assuming the transmission service is provided, many of these issues will become rate issues, as they should be in any event, because most of the claimed "technical" bases for refusing transmission service in the past have, in our opinion, been mere persiflage.

The FERC does have enough personnel to handle rate cases, transmission or otherwise, without major expansion.

More significantly, to the extent that FERC makes clear through its policy statements, rulemakings, and case resolutions that it intends to aggressively enforce its new transmission mandate to ensure fulfillment of Congress' pro-competitive goals, e.g., its correct recognition that it has the authority to order network transmission, parties will be encouraged to work out transmission arrangements without resort to FERC processes.

10. THE NEED FOR THE COMMISSION TO PROVIDE PUBLIC NOTICE OF PRE-FILING CONFERENCES.

Yes, the need exists.

The Commission has recently moved in the direction of providing public notice for pre-filing conferences. See, for example, the recent conference held in Interregional Transmission Coordination Forum, FERC Docket No. ER92-667-000, and/or ER93-771-000. It is not absolutely clear whether this notice was issued because there was an earlier filing pending which was to be amended, or because it was known that it was likely to be controversial. The noticing of such conferences is a good idea, and should be continued and expanded.

The basic problem here is that the FERC does have a regulation providing for a pre-filing conference for public utilities which intend to file a new proceeding. The theory has always been that the utility should be able to find out what requirements of form the FERC staff might have so that the filing would not be impeded by having numerous letters back and forth asking for and providing additional data. The rationalization has been that if the filing hasn't yet occurred, there is no reason to suppose that it will be contested, and thus that there is no ex parte problem.

That rationalization, of course, is nonsense. Nor is this simply a case where a non-decisional functionary (as a District Court clerk is supposed to be) provides advice as to forms to be followed. Pre-filing conferences tend to get into substance fairly quickly. The FERC staff involved, moreover, are not mere functionaries, but in most cases will have an input into the position to be taken by FERC in the proceeding.

If the pre-filing conference is noticed, the other side, if the filing is going to be contested, at least has the chance to find out about it, and the FERC staff will find out whether they can be assured that the filing will be contested. If all sides attend, after notice, and assure the staff that there will be no objection, then there is

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at least some reasonable level of assurance that, barring some new party coming out of the woodwork that is not known about, the matter can be handled more informally and with a lower level of concern.

If all sides attend and make the issues known to FERC staff (to the extent that the customers can know enough about the filing to explain the problems in detail), the process will at least give the FERC staff a headstart on their own analysis, so that the case can move more rapidly through the FERC procedural steps.

As a final thought on this point, the concept of a pre-filing conference should be expanded to include pre-filing conferences when a customer intends to initiate a proceeding. In the past, there have been instances when FERC staff refused to attend such pre-filing conferences when customers initiated the complaint on the ground that they knew the issue would be contested.

OTHER ISSUES WHICH ARE RELEVANT TO THIS OVERSIGHT HEARING

1. IMPERFECTIONS IN THE REFUND STRUCTURE OF THE FEDERAL POWER ACT.

One of the problems with the movement toward a market driven regime in the generation services is that there are inherent difficulties in the process of having a transmission host for a transmission dependent utility which is in the process of shifting its load to other, market driven, resources. For the structure of § 205 of the Federal Power Act permits a public utility to file any rate it believes it can justify, subject to refund. While this structure has always left the potential of filing a series of rates which imposed a "price squeeze" on the customer which was supposed to be remedied under the Supreme Court's decision in FPC v. Conway Corp., 426 U.S. 271 (1976), the fact that the customer usually has to leave the host's power supply in stages makes that customer very vulnerable to the decision of the host to change its rate structure and level so as seriously to adversely impact the economics of the customer.

Within certain limits, this sort of thing may be no different than other rate changes made subject to refund. At some level, however, this sort of thing can be quite punitive. If done in an ordinary contract context, there would be a potential for reparations and payment of damages should the rates be set in bad faith. The FERC apparently believes that it does not have reparations authority in this context, aside from refunds for rate overcharges; yet the overcharges may be the least significant effect of the different operations which are required by the faulty filing. While this

is not entirely clear, and there is a further argument that the FERC can at least make findings that would be the basis for a state court contract suit, the problem exists now.

This Committee thus might wish to examine the question of whether the FERC has or should have reparations authority in such circumstances.

2. EXAMPLES OF PROCEDURAL MISTAKES AND CONFUSIONS.

Your question above as to whether the Commission has employed a consistent and predictable philosophy in deciding cases raises an additional point which should be made. Even more important than a consistent economic philosophy is a consistent procedural philosophy; all participants to the process should know what is required of them so that there is more assurance of what must be done than the daily length of the chancellor's foot.

While this example may fall into the category of an extreme "sport" and while it is also still subject to the appellate process, the procedural problem was and is something about which many lawyers feel strongly. Because it is still subject to appeal, and because my firm represents one of the parties, I do not dwell on the details at all, but the Order on Rehearing in Entergy Services, Inc., FERC Docket No. ER91-569-001, issued August 7, 1992, contains one element which is worthy of your attention.

Entergy, a holding company covering all or part of the states of Mississippi, Louisiana, and Arkansas, had filed for a so-called "open access" transmission tariff, so that it could sell a very substantial amount of generation capacity, which it had taken out of its rate base to be supported by its power customers, at market. The filing was fairly massive, comprising testimony on cost of service and economic issues, as well as engineering issues. A number of Entergy's transmission customers (including one which I represented) had objected that its proposed open access tariff did not work properly to remedy the market foreclosure which occurred. The details of that argument are not important here. The FERC decided the issues raised, as it perceived them, without a hearing, on the papers before it.

Many of the transmission customers did not believe that the resolution of the FERC adequately solved the problem, and sought rehearing of the order and at least a "paper hearing" in which we could adduce a full case as to why the problem still existed.

The FERC, in its order on rehearing, seems to have held that a party intervening must include "an adequate proffer of evidence to support" its contentions

as to allegations of disputed facts. "Mere allegations of disputed facts are insufficient to mandate a trial-type hearing." Slip Op. at pp. 3-4.

In response to the comments that the notice period had not been adequate for the sort of counter case which the FERC seemed to envision, the FERC responded: "The notice of the filing was published on August 20, 1991, with intervention requests due by August 26, 1991. . . . The notice period provided adequate time to file intervention requests. The interested parties could have requested additional time to submit supplemental comments, and could then have filed evidence supporting disputed material facts." Ibid.

In other words, the traditional FERC notice style pleading was apparently supposed to have been abandoned without notice in favor of the old affidavit and counter affidavit pleading which used to be required in the equity courts in the days of Dickens.

I, for one, find this suggestion pretty appalling. I do not suggest that FERC may not argue appropriately in the Court of Appeals that the parties seeking a hearing did not properly allege a problem with sufficient specificity (although I do not believe that that is so), but there is no hint in the FERC rules and regulations that notice pleading is being abandoned, absent a motion for what amounts to summary judgement, which had not been made.

While this example has not been followed in any other case to the best of my knowledge, and while it occurred nearly two years ago, I find it an embarrassment to the idea of fairness and due process.

Mr. SYNAR. Mr. O'Neil.

STATEMENT OF ROBERT A. O'NEIL, MILLER, BALIS, AND O'NEIL, ON BEHALF OF NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Mr. O'NEIL. Thank you, Mr. Chairman and members of the committee.

My name is Robert O'Neil and I am appearing on behalf of National Rural Electric Cooperative Association, but in keeping with traditions of disclaimer, I have been asked to appear as a practitioner.

Mr. SYNAR. Your clients are protected, too.

Mr. O'NEIL. Very good. The views I express today necessarily are shaped by my experiences which extend over some 18 years before the Federal Energy Regulatory Commission, representing cooperatives and municipalities in general rate proceedings as well as negotiations with electric utilities for both bulk power purchases and transmission service.

Additionally, I think I have been very fortunate to have participated along with Mr. McDiarmid and Ms. Hull and some others in some think-tank type processes with individual FERC Commissioners, staff members, other members of the industry, discussing issues about where the industry should go.

Finally, I have had the opportunity to participate in various rulemakings on behalf of NRECA and others. It has been an incredibly exciting 5 years, and I think the years to come also offer a lot of excitement for us.

I don't think I can overstate the importance of the role FERC is going to play in determining whether or not competition is going to work, whether the vision that this Congress had with the Energy Policy Act will become a reality. And their decisions that they will be making both of a policy nature and an individual case-by-case nature are of grave importance to all members of the industry.

Good decisions rarely flow from incomplete data or consideration of inadequately developed arguments. I think Congress in the Administrative Procedure Act and the FERC through its own regulations recognizes this and has sought to establish an environment where issues and facts can be presented in an orderly manner and considered.

Although it is proper for FERC to use these formal tools, I think it is also realistic to recognize that there have to be informal methods of acquiring knowledge. The FERC is entitled to deferences of an expert regulatory agency and the only way to do that is to truly understand the industry it regulates. It can't just live behind closed doors and look at papers that come in. It has to get out there. It has got to understand how the industry works.

A particular concern I have is that part of the industry—the customers that section 205 of the Federal Power Act was written to protect. It is not enough that the Commission just understand the problems of the IPP's who want to sell or the investor-owned utilities who want to avoid stranded investment and want to assure they earn their fair return. But it is also essential to understand the needs and requirements of the customers, the smaller customers.

And part of the problem is that they haven't had the same level of access as the larger people. And that is not because the Commission doesn't want to do it. In fact, I have found individual Commissioners and staff members incredibly open, willing to sit down, willing to talk. But the difficulty is, small systems, whether it be in Edmond, OK, or Orange, CT or some other place, just don't live in Washington, DC. They don't have the people to come down and talk, and a special effort is going to have to be made to understand exactly what their needs are, or as we start trying to make some of the strategic decisions in the years to come, we may find that we will bring about some unwanted, unintended collateral damage.

I think the FERC again, particularly the new Commissioner, has expressed a tremendous interest in reaching out. I hope that does continue.

Mr. Chairman, I have addressed in my prepared statements a number of the specific issues raised in your letter.

With that introduction, I would conclude. Thank you.

[The prepared statement of Mr. O'Neil follows:]

STATEMENT
OF
Robert A. O'Neil

Presented
To
U. S. House of Representatives
the Subcommittee on Environment,
Energy and Natural Resources
on behalf of the
National Rural Electric Cooperation Association

August 6, 1993

Presented By: Robert A. O'Neil,
Miller, Balis & O'Neil, P.C.

Mr. Chairman and Members of the Subcommittee, my name is Robert O'Neil. I am a principal of Miller, Balis & O'Neil, P.C. and I am appearing today on behalf of the National Rural Electric Cooperative Association ("NRECA").

I appreciate the invitation to appear before the Committee today to present comments on important issues pertaining to the Federal Energy Regulatory Commission ("FERC"). My remarks will address the specific topics noted by Chairman Synar in his letter of July 28, 1993.

The views and opinions I express today necessarily are shaped by my past professional experience. For the last 18 years I have represented consumer owned power systems, such as rural electric cooperatives and municipal electric systems, in matters related to bulk power supply. This includes participation in cases before the FERC and in negotiations with power suppliers and transmitting utilities. Over the last several years, I also have had the opportunity to work with individual FERC Commissioners and staff members in study groups exploring possible changes to the structure and operation of the electric utility industry. Finally, I have had the opportunity to represent NRECA in a number of rulemaking proceedings and notices of inquiry promulgated by the FERC as part of its efforts to change and to respond to change taking place in the industry. This has been an interesting experience and it promises to be more interesting in the years to come.

The importance of the role to be played by the FERC in the evolution of a competitive bulk power market cannot be overstated. The FERC will be compelled to make many important decisions, both of a broad policy nature and with respect to individual rates in individual cases. Understandably, the decisionmaking process of the FERC is of great concern to everyone in the industry.

Good decisions rarely flow from analysis of incomplete data or consideration of inadequately received arguments. Congress, through the Administrative Procedure Act, and the FERC, through its own rules and regulations, recognize this, and have sought to establish and maintain an environment conducive to the presentation of facts and opinions of parties in a fair and orderly manner. The FERC has the tools it requires to gather information necessary to forge policy and make decisions. Congressman Synar's questions go to whether FERC uses those tools as effectively as possible. In the pages that follow, I will attempt to respond to those questions.

- ***The use of case-by-case decisionmaking instead of more general rulemaking to deal with broad issues and classes of cases and whether this technique denies parties their due process rights.***

In many respects, case-by-case analysis provides a vehicle to develop a more comprehensive record on specific issues than would be available in the context of a rulemaking. This is because the availability of discovery, the presentation of expert testimony, and the testing of evidence and testimony by cross-examination results in a record that can be far more

penetrating than the type of record established on pleadings alone in a rulemaking. On the other hand, by its very nature an individual case has unique characteristics that could mean that the "correct result" on a particular issue for that company and those customers is not the "correct result" for all companies and all customers.

On occasion, however, the Commission may wrestle with a particular issue in a number of cases and finally conclude that the time is ripe for a policy call, but that a formal rulemaking is not warranted. A number of years ago, for example, in a case in which I participated on behalf of a number of cooperatives, the Commission announced what has become known as the "West Texas" rule. This policy holds that if the Commission makes a preliminary determination that a filed rate increase is excessive by ten percent or more, it will suspend the increase for five months. If it concludes that the increase falls below that threshold, it will impose only a one day suspension. While this is a decision that has affected numerous utilities and customers throughout the industry, it reflects what I perceive to be a reasonable exercise of agency discretion.

Of course, individual companies and affected customers retain the right on a case-by-case basis to argue for exceptions to the "West Texas" rule. Consequently, the ability of the Commission to continue to respond to unique factual circumstances has been preserved notwithstanding a generic statement in an individual case as to how it will treat an issue. This is, I believe, a critical point. Although the FERC has quasi-legislative functions, and as such

is required to address broad policy issues, Section 205 of the Federal Power Act leaves unaffected its statutory mandate to assure that the customers of individual companies are not subjected to rates that are unjust or unreasonable. In this context, the Commission has an ongoing responsibility to ensure that a specific case does not constitute the "exception" to the rule.

For some issues a formal rulemaking is clearly superior to case-by-case decisionmaking, although frequently the initial structure of the rulemaking is influenced by a case-by-case experience. For example, the Commission's development of regulations pertaining to the nature and content of rate increase submissions clearly benefitted from a formal rulemaking but was based on experience gathered over the years in adjudicating individual cases.

- ***The use of Notices of Inquiry and Policy Statements instead of rules and whether this technique creates a hardship for utilities, customers and independent power producers who thus cannot challenge significant new policies of the Commission.***

A Notice of Inquiry constitutes a mechanism for the Commission to solicit information from interested parties. As such, it is a reasonable first step in the process of formulating policy. The key question is what is the appropriate next step: should the Commission pursue a formal rulemaking or simply issue a policy statement. While it is true that a policy statement precludes parties opposed to the approach the Commission has taken from seeking judicial review, it may well be a reasonable regulatory response in a situation where the Commission

feels it does not have a sufficient understanding of a situation to propose specific regulations. Of course, if that is the case, the Commission must be open in individual cases to arguments as to why its "policy" is inappropriate, and it should give those arguments due consideration. Significant due process concerns arise if the Commission issues a policy statement that is implemented as a de facto regulation.

- ***Any proposals or approaches which you believe would improve the problems arising out of the split Federal/state jurisdiction over electricity regulation, especially in light of the enactment of EPACT.***

NRECA has in the past advocated greater communication between FERC and state Commissions. Again, sound policy is best formulated with an objective and fully developed record. Given the important roles states have with regard to EWGs, demand side management, and power plant and transmission siting and certification, it is important that not only FERC but also regulated utilities and wholesale customers seek to coordinate with state regulators.

- ***Your opinion of the feasibility and desirability of using regional transmission groups (RTGs) to deal with transmission access issues. Please include discussion of planning, pricing, coordination, terms of access, scheduling, harmonization with state regulations, eligibility for membership, the states' role and definition of regional geographic scope.***

Properly structured, planned, and priced RTGs are probably the most viable vehicle for fostering a competitive bulk power sales market. Last fall, I had the opportunity to work with other representatives of the utility industry, as well as the Department of Energy and the FERC,

in efforts to develop a consensus approach to the establishment of RTGs that could be reflected in the Energy Policy Act. Unfortunately, Congress worked faster than the private sector in this instance, and by the time that the RTG consensus was achieved, Congress had completed its work. Although not reflected in legislation, the concept of the RTG remains sound, and FERC has pursued it through a notice of inquiry and most recently publication of a policy statement.

To understand the importance and the potential of RTGs, it is necessary to appreciate the tremendous risks to the competitive bulk power market if transmission access and pricing are not provided on reasonable terms. In this regard, it is important to recognize that integrated utilities with dominant positions in transmission ownership have every reason to use that ownership to enhance their position as sellers of bulk power and distributors of power. It would be contrary to economic theory and contrary to human nature to expect otherwise.

On the question of transmission pricing, for example, some utilities argue that transmission customers should pay both a share of the embedded cost of the entire transmission system and any incremental cost associated with providing transmission service to those customers. The argument advanced is that this treatment is necessary to "protect" native load customers. Meanwhile, the "embedded" cost of the system grows as incremental additions are made to serve the native load. Totally apart from the fact that Transmission Dependent Utilities are "native load" customers and should not be discriminated against, pricing based upon embedded cost and incremental cost can place the utility purchasing transmission service at a

distinct competitive disadvantage vis-a-vis the transmitting utility. The economic advantage realized by the transmitting utility through transmission pricing enhances its economic power in other markets, such as its bulk power sales markets and its distribution markets. The economically disadvantaged utility may find its competitive position eroded to the point it becomes the target of an acquisition by the transmitting utility.

If we are to have a competitive bulk power market, which is the policy espoused by Congress in the Energy Policy Act, we must be contemplating power procurement that may and likely will involve transmission over multiple systems. If each and every intervening system extracts a contribution to embedded cost plus incremental costs, you do not have to be a PHD in economics to understand that the only survivors are going to be utilities who own expansive transmission systems. In fact, such a pricing regime unquestionably would spur acquisitions directed at consolidating control of transmission for the preferential, if not proprietary, benefit of the owning utility. The type of competitive markets contemplated by the Energy Policy Act would not develop, but instead markets would be concentrated and that concentration would not be due to any inherent economic efficiency, but rather control and pricing of a monopoly resource.

FERC properly rejected the notion of loading transmission charges in this manner when in its Northeast Utilities decision it rejected embedded cost plus incremental cost pricing. But RTGs provide the potential for a much more sophisticated response to pricing and access. They

offer the opportunity to plan, construct and operate multiple utility, integrated transmission systems in such a way that individual participants in the industry, whether they be distributors of power buying at wholesale, generators of power selling at wholesale, or integrated utilities engaged in the generation, transmission and sale of power, can work together to assure that power is transmitted reliably, economically and with a minimum of disruption to the environment. The winners and losers of competition in this regime will be determined based upon the efficiency with which they can produce power or distribute it and not by the ownership and control of monopoly resources.

While RTGs offer economic and environmental potential that is attractive from a public policy standpoint, again it is important to recognize that transmission owners cannot be expected to willingly surrender the advantage that transmission ownership provides. Indeed, if they could, it would not have been necessary for Congress to enact the amendments to Section 211 of the Federal Power Act to accord the FERC much broader powers in the area of bringing about transmission access. The existence of Section 211 in the statute books simply underscores the fact that when it comes to transmission access, transmission owners and transmission customers do not have equal bargaining power. And I can assure you, based upon my years of experience representing the customers, it is very rare indeed that the customer has the advantage.

This brings us back to the critical role played by the FERC. Although I have been involved in numerous negotiations of rate cases over the years, and I very seldom have felt that

my client had the negotiating advantage, very few cases have actually gone to trial. This is because in the course of negotiations when it comes to thorny points, I can always say: "well, we'll take it to FERC, and see what they have to say." If I am on sound ground and in fact e other side recognizes that the FERC will not agree with their position, a compromise can usually be reached. Quite simply, it is the presence of the FERC as the "cop on the beat" that allows the small competitors to do business.

It also is important to acknowledge both the reality and necessity of informal communication with the Commission and its Staff. The reality is that the Commission probably never has conceived, formulated and implemented its regulatory policies from behind closed doors at 825 North Capitol Street, through which pass only written pleadings submitted as a result of notices of inquiry, formal rulemakings, or individual rate cases. That reality is borne of necessity: the deference to which the Commission is entitled as an expert regulatory agency is predicated upon its knowledge of the industry. To truly understand the industry, the Commission and its Staff must have informal access to the industry. But to do the job effectively, and to truly understand the industry, the Commission must know not only the unique problems and concerns of the entities it regulates, but also the problems and the needs of the customers that by statute the Commission is established to protect. And it is in this area I believe that more needs to be done.

When I say more needs to be done, I do not mean to suggest that the Commission intentionally turns a blind eye and a deaf ear to customers. To the contrary, I have found individual Commissioners and Staff members willing to make themselves available to meet with representatives of customer groups and discuss emerging policies. The difficulty in large part is due to the fact that the regulated industry has greater resources and greater opportunity to present their views and their concerns to FERC policy makers. And while NRECA and APPA have become more and more proactive in efforts to convey their interest and concerns to the FERC before notices of proposed rulemaking hit the streets, special care must be taken by the Commission to acquire a broader understanding of the needs of the customers. This extra effort is not warranted due to abstract concerns of due process, but rather because sound policy can only develop where the Commission understands the concerns of all the constituent groups.

- ***The need for a National Power Survey.***

NRECA does not have a formal position on the need for a National Power Survey.

- ***Your views regarding proposals to transfer jurisdiction from the SEC to FERC such as has been suggested by Senator Bumpers, or other approaches to the OPCQ problem.***

The transfer of jurisdiction of certain regulatory functions to the FERC would make sense.

- ***The proper role of the Public Utility Regulatory Policies Act (PURPA) after the enactment of EPACT. Should PURPA be amended?***

NRECA does not have a formal position on this issue.

- ***Whether FERC employs a consistent and predictable economic philosophy in deciding cases which provides utilities or independent power producers with a general, advance look at how they may rule.***

I think the FERC has been fairly predictable in their policy objectives over the past several years. FERC's decisions in individual cases may not have been entirely predictable, but I think that reflects the fact that the FERC itself has been gaining greater understanding and knowledge of the industry, and this is reflected in its decisionmaking. However, I think that the FERC's policy decisions must be viewed as evolutionary, rather than erratic or revolutionary.

I also believe that the Commission's forbearance from revolutionary change is well founded.

- ***Whether you think FERC will have the necessary personnel to carry out its EPACT mandates.***

I certainly think that the FERC should be provided the necessary personnel to carry out its EPACT mandates, even if that requires an increase in staffing. It is difficult to comment on the entire spectrum of issues raised by EPACT, but let me illustrate the point by focusing on the transmission access related issues. Although, I certainly hope that RTGs develop and live up

to their potential, the fact remains that when transmission disputes arise, the FERC will be expected to fulfill its statutory responsibility to resolve those disputes. There are major technical issues, as well as equitable and economic issues, that can arise in transmission related disputes. Finally, transmission related disputes may not be amenable to FERC's basic statutory remedy, which involves the payment of refunds. For example, a prospective bulk power purchaser faced with the need to make a decision on competing competitive bids within a five month window may find a FERC decision on the issue rendered two years later to be too little too late. If the wrong purchase decision is made, there are no refunds to collect.

On the other hand, it may be unrealistic to expect the Commission to respond on an accelerated basis to complex transmission related matters if it has no preexisting understanding of the transmission network that is the subject of the dispute. While the availability of computers, and the fact that much data can be filed electronically and updated periodically, offers the Commission the ability to have a solid database with which to begin its analysis, it may become desirable for the FERC to have regional engineers actually working in the field with utilities and customers on a day-to-day basis to learn of system requirements and developing issues. I am not saying that this definitely is a good idea, only that if it does appear desirable, the benefits to the industry may be such that staffing concerns should not become a barrier.

- ***The need for the Commission to provide public notice of pre-filing conferences.***

The pre-filing conference can be a very useful means for a regulated utility to assure that a filing satisfies the Commission's special requirements and addresses at the outset information that the Commission's technical staff believes must be included. I took advantage of the opportunity to have a pre-filing conference with the Commission Staff at the time Golden Spread Electric Cooperative, a FERC regulated generation and transmission cooperative serving customers in Texas and Oklahoma, filed its initial rate schedule. Golden Spread sought the conference because it felt the Commission Staff was not familiar with non-profit cooperatives as regulated utilities, and wanted to be sure to include testimony and such other information in the rate filing as would help the Commission understand the nature of the business and the nature of the rates being filed.

While I have never had the impression that any clients I represented were materially adversely affected as a result of an applicant utility taking advantage of a pre-filing conference, I can understand why there might be some concern. I do not believe that an applicant utility would be prejudiced by a requirement that it notify the customers proposed to be affected by the rate filing that a pre-filing conference was being held. Of course, notice of the conference, whether by general publication in the Federal Register or by a requirement that applic nts for the conference provide specific notification to affected customers, does not resolve the issue. For example, should the prospectively affected customers be entitled to copies of any n terials

that the company proposes to submit to the staff, and if an affected customer is allowed to attend a conference, should the customer be allowed to present its own information and arguments as well. Finally, if that occurs, will applicants simply forego pre-filing conferences, and will customers be advantaged or disadvantaged as a result? I do not know the answers to those questions. Perhaps, to go back to Congressman Synar's first question, this would be a good topic for a rulemaking.

To summarize, we are moving into an exciting and a challenging era. I believe the Commission has the tools to do the job entrusted to it by Congress, and NRECA and its members look forward to working with Chair Moler and the other Commissioners in the months and years ahead. Thank you for the opportunity to appear before you. I will be happy to respond to any questions.

Mr. SYNAR. Thank you, Mr. O'Neil.

Are there instances you all know where the decisions of FERC on a particular application were originally presented as being specific only to that case, then only later did you see them cited as precedent on other cases?

Mr. SHOLANDER. I can state that the FERC in many instances over the past 5 or so years has used a case-by-case approach to set policy.

Mr. SYNAR. And you haven't seen it cited as precedent later on other cases?

Mr. SHOLANDER. In later cases, the initial case where the determination was made was invoked as existing Commission policy. And that is one of the concerns that we addressed in our testimony, and one of the reasons, by the way, why we are so pleased with the notice of inquiry on the transmission pricing issues.

It is frustrating when policy is set on a case-by-case basis and the broader concerns of the industry are not allowed to be fully aired in the context of those individual cases. So we are pleased with the notice of inquiry on transmission pricing, the fact that the Commission's existing policies on transmission pricing which were set on in case-by-case approach are going to be looked at right now.

Mr. SYNAR. Any other ones?

Mr. McDiarmid.

Mr. MCDIARMID. Yes, your Honor—I mean, Mr. Chairman. I am so used to answering judges. There have been some such incidents.

Mr. SYNAR. The reason I am asking is, this leads me into the next question. Mr. O'Neil and Ms. Hull can answer this, too. Do you find yourself intervening in a lot of cases where you are doing it as a defensive action for your clients, and basically you are running a pretty expensive meter—do we have too many intervenors because you have to protect your clients?

Mr. MCDIARMID. My clients frequently want me to intervene for that reason in cases where I have to caution them that I think it is a waste of money and time to do so. Mostly I can talk them out of it. As a practical matter, a client in California is not going to be paid attention to in a case in New England. So it doesn't do them any good, even if there is going to be a precedent set ultimately.

Also, as a practical matter, you have got the Northeast merger case, alluded to earlier, a case in which almost everyone, every interest and their brother and sister and cousin were involved. It was hardly a case where there wasn't an interest, where there was some interest somewhere or other that simply wasn't being heard from.

Individual entities may not have been heard from, but every interest was there in that kind of case, where the Commission can feel reasonably comfortable in making a policy judgment—and there are a lot of policy judgments that have to be made on a case-by-case basis—but where they can feel reasonably comfortable in doing so and expect to have it stick.

The problem, as you point out, is in a case where they say, Well, we are just doing this in this case only, and 2 months later somebody says, Oh, well, that is the Commission's policy. They haven't done that recently, recently being in the last few months.

Mr. SYNAR. But you worry about that?

Mr. MCDIARMID. Yes.

Mr. SYNAR. Mr. O'Neil, any comment?

Mr. O'NEIL. Yes, Mr. Chairman. I think that even though the Commission is a quasi-legislative body, it has aspects of the civil law system where it does look to precedent, and to the extent an issue occurs, they will say: Have we ever faced this before and what do we do.

Where the Commission has to be sensitive is when it encounters what could be a different factual circumstance in a subsequent case to make sure it doesn't give the back of the hand to the facts; in other words, turn a factual resolution into a policy decision that is immutable. And that gets to individual judgment. You can't avoid issues in individual cases.

By the same token, you shouldn't squander the analysis and resources that went into developing an issue in a particular case. But you have to be sensitive to the fact that there are exceptions to the rules.

Mr. SYNAR. Ms. Hull.

Ms. HULL. I was thinking, well, these issues are going to come up. They are either going to come in a case-by-case determination or they are going to come up in a rulemaking. I am going to have to participate in either one that raises an issue of interest to my company, that it probably costs us a little more to participate, since we mostly intervene, it would probably cost us more to participate in a rulemaking.

Rulemakings have a sense of finality and it makes it much more difficult to change those later on. I think, from my perspective, the case-by-case approach is a more cost effective approach for us, particularly as these issues are in such a rapid state of evolution.

As I mentioned in my testimony, when you get to something like market-based pricing, which FERC is now——

Mr. SYNAR. We are going to get into that in a second. Hold that thought.

Mr. Sholander, do you think there is anything that FERC or the State PEC's can do even without Federal jurisdiction to reduce the distinction between QF's and the exempt wholesale generators?

Mr. SHOLANDER. To reduce the what?

Mr. SYNAR. The distinction.

Mr. SHOLANDER. I think that the Commission, the Federal Energy Regulatory Commission, can address some of the problems that we——

Mr. SYNAR. What does EEI favor in this case?

Mr. SHOLANDER. What do we favor vis-a-vis the QF's?

Mr. SYNAR. Right.

Mr. SHOLANDER. We feel we need the Federal Regulatory Energy Commission to address some of the issues they raised in their ADFAC NOPR, and get back to the question of whether or not there should be a tighter FERC control over State processes which establish what it costs, to make sure that local utilities are not forced to pay for QF power that is above avoided cost.

If that is done, that reduces the pressure for legislation to take away the mandatory purchase obligation for utilities on QF's, because if QF's are not allowed to charge more than what the com-

petitive alternatives would be, it reduces the anticompetitive effect of the mandatory purchase obligation.

But if that can't be resolved at the FERC level, then obviously we have to hold in our back pockets the possibility that legislation might be needed to eliminate the mandatory purchase obligation.

Mr. SYNAR. Another concern you expressed in your testimony was the definition of market power. You put forward in your testimony a view that was the same as the Antitrust Division at Justice, that FERC should develop, "a market screen." What would that market screen look like?

Mr. SHOLANDER. I think the best way of describing it is to characterize the focus of that kind of market analysis. And the focus is on whether or not there are sufficient competitive alternatives for the purchaser of the power to mitigate any assumed market power that the seller of the wholesale power might have.

And that is not necessarily the focus that the FERC has brought to bear in its market power determinations. It often held, for example, that a utility had market power merely because it owned transmission facilities, but that avoided the issue of whether or not the buyer of the power being sold by that utility had other alternatives or sufficient alternatives that would have precluded whatever exercise of whatever market power FERC thought was being possessed by the owner of the transmission system. I think it is the focus of the antitrust laws.

Mr. SYNAR. You say in your testimony FERC that has an increasing reluctance to accept voluntary agreements as was done regularly in the past. That is controversial. How would you assure that such voluntary agreements were in public interest?

Mr. SHOLANDER. I think this gets back to the issue of the FERC's willingness to review its policies in generic types of proceedings so that once there has been a complete airing of the assumptions and the economic theories which underlie FERC policy, once that has all been settled in a generic proceeding, then there can be an implementation of these policies in a case-by-case basis.

Mr. SYNAR. Would you like a general test form set down?

Mr. SHOLANDER. No, I don't think any cookie cutter——

Mr. SYNAR. Do you want State PUC's to review them? Would you like a State PUC to be able to review them and bless them?

Mr. SHOLANDER. Often the State PUC, as you know, under the Energy Policy Act, is encouraged to exercise its jurisdiction over the buy side decision of the purchasing utility. So often the FERC is presented with a voluntary transaction that has actually been approved at the State level.

And that is one of the additional problems presented by the FERC, deciding to use that case where the State PUC has already authorized and blessed the purchase or the sale, for the FERC to use that as a case to develop its policy.

Mr. SYNAR. Mr. Mica.

Mr. MICA. Thank you, Mr. Chairman.

One of our previous witnesses spoke to regulatory gaps, I think both in his comments before us and submitted comments. What do you all see as regulatory gaps, even with the new legislation that we have, the short experience we have with it?

Mr. SHOLANDER. Well, I don't believe that we feel that there are any regulatory gaps that need specific legislation. We don't need an additional layer of legislation, for example, establishing regional regulatory bodies or authorities, for example.

Mr. MICA. How about you, Ms. Hull? I don't know about additional bodies, in fact, I want to talk about that in a second, but I was speaking more to some areas that may have slipped through the cracks as far as regulation in this process.

Ms. HULL. The Senate bill addresses the Ohio case that was alluded to by the previous panel as falling between the regulatory—falling in that regulatory gap. And I have to say that it probably looks to me that there is a regulatory gap there that definitely needs to be filled, and it needs to be filled by legislation.

I would point out that on transmission and wholesale generation issues, in general we are not—of this type, of the Ohio case, that what we have in electricity is less of a regulatory gap than an overlapping regulatory setting. We are very—the electric sector is very different from the natural gas sector, in that FERC had overarching authority and had basically preemptory authority over States. And States did not have the elaborate regulatory scheme in place in natural gas that they do have in place of electricity, and they do have a lot more jurisdiction in electricity than they had in natural gas.

So I think particularly with respect to electricity, yes, there are some gaps, and the one identified by the previous panelist I think is pretty obvious, but the problem in electricity is less of a regulatory gap than a regulatory overlap.

Mr. MICA. Speaking of regulatory overlap, I have seen several recommendations also, I think SEC is still involved in this process, and recommendations to take them out. What do you all think about that? Ms. Hull and Mr. Sholander.

Ms. HULL. For both my company and my trade association, we have no position on that.

Mr. SHOLANDER. Are we speaking about the Ohio decision, whether or not there should be a legislative fix to that?

Mr. MICA. Well, here again, here I was talking about the SEC's current regulatory authority, should we take them totally out of the picture?

Mr. SHOLANDER. No. We don't feel that efforts to shift jurisdiction to the FERC over nonpower supply holding company, intraholding company transactions, should be done. We obviously recognize that there are parties who are concerned about whether or not the SEC brings enough of a consumer perspective to its review of those. But there are significant other issues that the SEC is charged with reviewing as part of its review of those transactions.

And shifting that authority over to the FERC may create even bigger problems in terms of the overall financial impact on the holding company system. So that we do not believe that that is a proper approach to take.

Mr. MICA. One question about—again, about this whole regulatory process. Another area of contention seems to be the regional authorities.

What kind of recommendations do you have relating to, say, joint board creation and relegating some specific authority to, say, regional authorities as opposed to FERC?

Mr. SHOLANDER. We certainly encourage or would encourage State commissions to coordinate among themselves, particularly as the wholesale market develops on a regional basis. And we also encourage the State commissions to coordinate with the FERC on this. In fact, we feel that is likely to be a phenomenon that will increase.

Mr. MICA. Does FERC have enough authority in the existing legislation to accomplish what you think needs to be done?

Mr. SHOLANDER. I believe so.

Ms. HULL. I would agree with that. I would be very reluctant at this point to add another layer of regulation between the States and the Federal level. I would like to see the response to the Energy Policy Act among the States as a result of RTG's, as a result of their efforts to deal with these issues, and to see how the ongoing FERC and State dialog progresses, because my guess is that those will be probably sufficient to handle the problem.

Mr. MICA. There has been also a call for some greater authority—to give FERC greater authority over interconnection in wheeling. In general, how do you feel about that?

Mr. SHOLANDER. The new grant of authority in the new section 211 of the Federal Power Act includes already the necessary conditions that must be placed upon the ability of the FERC to order wheeling to protect reliability and to ensure that native load customers are not left with subsidizing third-party use of the system. So I don't feel that any greater authority would be in the public interest.

Ms. HULL. Let me add, I believe, with respect to the ability to order transactions to occur, that probably FERC has adequate authority at this point. I do think there is a lack in terms of—I am going to say a bad word—Federal eminent domain—that may become necessary as the transmission grid is enhanced.

Mr. SHOLANDER. May we respond to that?

What that in effect says is that the Federal Government should be able to preempt local decisionmaking as to where powerlines reside and the extent to which new powerlines need to be constructed to support the wholesale market.

If there is any issue in the electric utility industry that requires in effect the local public to cooperate and understand and bless what is going on, it is the construction of powerlines. So we would be very troubled with that kind of a preemption, because we feel that the system, the electric utility industry must be responsive to the concerns about the siting of powerlines. Those are not decisions that can be made out of Washington.

Ms. HULL. This obviously is not the appropriate forum to discuss this issue, but there are things that can be done about that.

Mr. SYNAR. Let's stop on that note. Mr. Hastert.

Mr. HASTERT. Thank you, Mr. Chairman. It is an interesting issue that there is some discrepancy between different types of companies and what your needs are and what your view of regulation is.

Now, I am sorry for being here a little bit late. I had to leave for an appointment, but Mr. Sholander, you are from Kansas City Power and Light. Is that an investor-held utility?

Mr. SHOLANDER. Yes, it is.

Mr. HASTERT. What areas do you cover?

Mr. SHOLANDER. We serve the western portions of Missouri and the northeastern portions of Kansas, basically the Kansas City metropolitan area.

Mr. HASTERT. Greater Kansas City area?

Mr. SHOLANDER. Yes.

Mr. HASTERT. Now, are you—did you before the EPACT, did you have excess capacity? What is your generation?

Mr. SHOLANDER. We do not have excess capacity now, but in all candor, our two State commissions found when we tried to put our last new generating unit in rates, they both found that we did have excess capacity at that time.

Mr. HASTERT. How much?

Mr. SHOLANDER. That was 1985.

Mr. HASTERT. How much excess capacity?

Mr. SHOLANDER. I can't remember the numbers.

Mr. HASTERT. Roughly. Excess of 15, 25 percent?

Mr. SHOLANDER. No, no, it was not that large.

Mr. HASTERT. What is your generation, coal generation, gas?

Mr. SHOLANDER. We are primarily coal, we do have a nuclear unit. Our current construction plans are for gas.

Mr. HASTERT. So you will go to gas peekers basically, gas generation?

Mr. SHOLANDER. That is our current——

Mr. HASTERT. What was the size of your nuclear unit?

Mr. SHOLANDER. They were—I am not an engineer, but I think they were around 900 to 1,000 megawatts. Just one unit.

Mr. HASTERT. So basically what do you do now, are you, after the EPACT? Are you planning on wheeling electricity, selling it?

Mr. SHOLANDER. We have been a wheeling utility since 1977, and since that time, we have not refused any request for firm transmission service for wholesale customers.

Mr. HASTERT. Miss Hull, LG&E, was that an IPP?

Ms. HULL. Our company was formed in 1968 and since then has transferred ownership a couple of times. We were most recently acquired in 1991 by LG&E Energy Corp., which is an exempt holding company from Louisville, KY, and they also own Louisville Gas & Electric.

Mr. HASTERT. Where is your generation or is it all over?

Ms. HULL. For the power system side, again, we have developed and built, owned and operated 20 facilities. We now only own seven of those. As a consequence of the purchase by the utility, we could only own 50 percent of our facilities, so we had to sell off some of our——

Mr. HASTERT. Spread out across the country in Louisville?

Ms. HULL. No, not in Kentucky. California, Virginia, Maine, New York, North Carolina.

Mr. HASTERT. So basically you fill gaps in markets that were there?

Ms. HULL. Right, we go where the market is, exactly.

Mr. HASTERT. So it is important that you have transmission lines and the ability to move your product?

Ms. HULL. Critical, crucial, absolutely.

Mr. HASTERT. So your view is that there ought to be a Federal approach on this instead of State by State?

Ms. HULL. No, no. Please don't misunderstand me.

Mr. HASTERT. No, I am just asking you to clarify.

Ms. HULL. Let me also be sure to add that I am speaking only for myself at this time. I am not speaking for the trade association.

What I am concerned about is that some extra high voltage lines may need to be built to build up our interregion connections, and that those are usually multi-State lines and it is very difficult to get all of the States in line. I understand the need for State participation and all that.

Mr. HASTERT. You need to be very candid because we need to look at the whole industry.

Ms. HULL. But I am not advocating a State—I mean, a Federal gorilla to come in and put in powerlines, but it may be necessary as a consequence of RTG's if it is very difficult.

Mr. HASTERT. Mr. Sholander, you wheel electricity in a multi-State area, I presume probably Missouri, Kansas, other facilities?

Mr. SHOLANDER. Yes.

Mr. HASTERT. How about cooperatives, do you sell to cooperatives?

Mr. SHOLANDER. We wheel for municipal, cooperatives, other IOU's, as I said, we haven't turned down any request for firm service since 1977.

Mr. HASTERT. But yet you see a need to reserve, to control transmission lines and right of ways?

Mr. SHOLANDER. We have noticed, as we have tried to beef up our system, and obviously we are planning for the future as well, we have noticed a much greater public resistance to the construction of transmission lines, and we feel that that concern must be addressed at the local level.

Now, we wanted to build these lines so we have been on the side of the issue of trying to allay those concerns, but we do recognize that people are going to be concerned at the local level and that these decisions as to whether the line should be built should not be a Federal decision.

Mr. HASTERT. OK. I am being an honest broker in asking these questions, I don't have a prejudice in this, but you have to deal with two State commissions presumably, maybe more, but two State commissions.

Mr. SHOLANDER. Yes.

Mr. HASTERT. And it is easier then—and you have to go through the commissions obviously or eventually rather than just broker between communities and where your lines are going to go, I would assume. Their recourse is through the commission.

Is it easier to go through two State commissions than to deal with the FERC? Is the FERC that difficult to deal with or what?

Mr. SHOLANDER. No, on the transmission issue, we don't go to the FERC, on the construction decision itself, on the siting decision.

Mr. HASTERT. You would if it would be interstate, though, right?

Mr. SHOLANDER. No. If it were a line that literally crossed the State line, we would go to both the commissions, but our current construction programs don't require us to go to both State commissions, it is one or the other.

Mr. SYNAR. Let me interrupt you on that.

Mr. HASTERT. Sure.

Mr. SYNAR. We will move on to Ms. Pryce.

Mr. HASTERT. Did my 5 minutes go that quick?

Mr. SYNAR. Yes, it did.

Mr. HASTERT. Time flies when you are having fun.

Ms. PRYCE. Thank you.

I was reviewing the written testimony of Mr. McDiarmid and, as a practitioner, you really didn't say too much and thank you for your expediency, but I am very interested in your comments and I would like you to expand upon how you feel this new group might learn and build upon mistakes made in the past, any suggestions from you.

I would like to hear and I am certain that they would make the best of your input.

Mr. MCDIARMID. That is a very open-ended question, thank you very much.

The basic problem that any regulator has is the one which was identified by Mr. O'Neil, that they have to fill a dual function, they have to both be an expert regulator and they have to be a judge, and that is an inherently contradictory kind of function that they have to fulfill, and it has driven every commissioner I have ever known, if not up the wall, at least it has made it very difficult for them to try to accomplish their job in the best way possible.

But it is sort of necessary, and really all I can say is that they are approaching things now, I think, in a very open and straightforward way, they are putting out policy statements. Whether I agree exactly with the terms of the policy statement is a separate question, but as a functional matter, doing that at least lets people know where they are from a procedural and theoretical point of view.

They are issuing rulemakings. That gives people a chance to comment to a much greater extent, then the final rule will be a bit more permanent, but the problem of dealing with the opening up of a massive change in one of the more important industries that the country has got to deal with in terms of our infrastructure is one which is greatly important, and they can't afford to tie themselves down too quickly, either.

On the other hand, they have got to deal with the cases that are before them. I pointed out that several of the people whom my clients would think of as malefactors have managed to try to preempt the situation by filing large cases at FERC to put these transmission issues in the rate case context, but there are a lot of rather significant issues that are going to have to be dealt with there.

They are going to have to do it, they are going to have to do it in that context or within the timeframe that that context demands. They can do it by rulemaking in the same timeframe presumably, but that is not going to get them much more information than will be available in those cases, so they are just going to have to move through those with as much information as they can get and do the

best they can and do it honestly, and that is all any practitioner can ask for, and they may make mistakes, they almost certainly will make mistakes of some sort or another.

We just hope that they will be fewer.

Ms. PRYCE. As a practitioner you believe that they are off to a good start?

Mr. MCDIARMID. Yes.

Ms. PRYCE. I guess I couldn't expect you to say anything different right now, but you are pleased with the changes they have made?

Mr. MCDIARMID. It is not just that they are all sitting immediately behind me, I don't believe that any of them actually came armed into this room, but, yes, I am, and I think most of us are.

Ms. PRYCE. I am pleased, too. Thank you.

Thank you, Mr. Chairman. Yield back.

Mr. SYNAR. Thank you, Ms. Pryce.

Mr. McDiarmid, your testimony alludes to an application that GAO left out of the analysis which was not considered because of its unrepresentative nature. We are talking about the "Quad 7" case.

I could spend a whole hearing on this, I just want you to know.

Mr. MCDIARMID. So could I.

Mr. SYNAR. Does that bother you that they did that, and are there other cases like that where there has been unresolved policy for as long as that one was, which was 20 years?

Mr. MCDIARMID. There have been others where there have been unresolved policy for almost as long. In the proceedings in the hydro relicensing proceedings, for example, which ultimately were resolved by congressional action or partially resolved by congressional action, leaving some things for FERC to do, which are still hanging fire. I hope not to have to be back on that one, the Commission also was unwilling to bite the bullet and resolve policy questions which were clearly before it, and it was one of those things where they partly did and then the courts partly resolved it, and then they partly changed their mind and the courts partly resolved that, and it went back and forth and back and forth, and ultimately wound up here.

There was a song to that effect once, and it is not any better as a song than it is as a legal theory. It goes round and round and round, and ends up here. I hope that this Commission at least has——

Mr. SYNAR. But you don't see this as a pattern at all?

Mr. MCDIARMID. It was.

Mr. SYNAR. But it is not anymore in your estimation, or is it too early to say?

Mr. MCDIARMID. This Commission is giving off indications that it is not going to be a problem.

Mr. SYNAR. Let me ask you another question. You state that FERC should give notice to prefiling conferences to customers as well as utilities?

Mr. MCDIARMID. Absolutely. I think that one of the best things the FERC can do and that Chair Moler and her staff have started doing is noticing such conferences.

Mr. SYNAR. That won't add additional procedures and delays, will it?

Mr. McDiarmid. If anything, I think it would probably shorten things. It will give them a chance to know what the real issues are, know in advance, and that kind of knowledge always helps get things resolved.

Mr. Synar. You also say in your testimony that in a recent case you were required to file an unusually detailed motion in order to intervene, and that was an unexpected departure in the procedure.

I am going to ask FERC about this issue, but could you give your views of the effects of that procedural change?

Mr. McDiarmid. So far as I can tell.

Mr. Synar. Was it applied consistently?

Mr. McDiarmid. No, so far as I can tell that happened only in that case, it was a sport in that context.

Mr. Synar. But it would be devastating to intervenors if it was repeated?

Mr. McDiarmid. Well, let me put it to you this way, many of my partners have come to me and said, good Lord, if I have to do this, I can't possibly get all of the testimony together and everything else that would be necessary within the timeframe of the intervention or even within 1 month thereafter.

The company comes in with a case, which is typically 1, 2, or 3 feet of documents. These are not small cases.

Mr. Synar. The bottom line is if they do that again, you are out?

Mr. McDiarmid. That was the problem there. There are other issues in that case, and I am not addressing any of those. There are other defenses that they have got.

Mr. Synar. I think we have put some people on notice that I wanted to.

Mr. O'Neil, how would the RTG's protect interests like yours that you represent?

Mr. O'Neil. I think that the main thing, when you start talking about the interest, I would focus on the interest of the purchaser as opposed to the seller of bulk power.

We have to recognize in this brave new competitive world that we are talking about there may be an effort to foster IPP's, but you still have the distributors down there, either the immediate generation and transmission cooperative or maybe just a distribution cooperative looking to make a purchase.

That customer is going to have to have the ability to meet a public utility responsibility to keep the lights on and if it is going to survive as an entity, it has got to do it economically. It is not going to move. The town of Edmond, OK, is going to stay in Edmond, OK, and the question is how do you get the power there.

Now, as the system evolves, as loads would grow in Oklahoma City, as power plants get retired in Muskogee, power flows change. The grid has to be adjusted to account for this. The RTG provides an opportunity for the smaller entities, whether it be the Oklahoma Municipal Power Authority or Western Farmers Electric Cooperative to get together with the bigger guys, Oklahoma Gas and Electric Co., Public Service Co. of Oklahoma, put the package together and say what makes sense, and that is a type of planning, it can't be done in a rate case.

Once a utility has made a filing in a rate case and has said, well, the transmission charge has to be this because all our lines are

over here and your load is over here, that is like having built a power plant that never had to be built in the first place, and arguing that it was imprudent and you should penalize someone.

Well, the point is, good planning leads to good resource allocation, so you don't have to worry about penalizing stockholders or anyone else. Getting the information out, you know, I think that by and large people, given the clear understanding that they are not going to be permitted to take undue economic advantage of others and given the opportunity to have the information, will in fact work together to try to solve engineering problems.

Mr. SYNAR. Final questions, panel?

Mr. HASTERT. Yes.

Mr. SYNAR. Mr. Hastert.

Mr. HASTERT. Thank you.

Mr. O'Neil, you are a co-op, a representative co-op; is that correct?

Mr. O'NEIL. That is correct.

Mr. HASTERT. Now, do you have one purchaser that you usually purchase electric generation from or do you generate? You don't generate, do you?

Mr. O'NEIL. Actually my firm represents cooperatives and municipalities throughout the country, ranging from Seminole Electric Cooperative in Florida to the Okmulgee Municipal Power Authority.

Mr. HASTERT. So you don't represent a company per se?

Mr. O'NEIL. No.

Mr. HASTERT. Fine, I won't ask you the question, then. Just to get the record straight, Mr. McDiarmid, you are an attorney and you represent who usually?

Mr. MCDIARMID. I represent cities, cooperatives, some States, PUC's, that is all customer groups or representatives.

Mr. HASTERT. You act as an intervenor many times in rate cases?

Mr. MCDIARMID. Yes.

Mr. HASTERT. I am going to ask you all just one question, just try to briefly give me a yes or no, then if you have a quick explanation, please follow through. What is the opinion of the members of this panel regarding FERC's recent decision that EPACT requires the provision of wheeling services to QF's under the same terms and conditions as all other potential transmission system users?

Mr. O'NEIL. I thought that that was the result of the court remand. The court of appeals, as a result of the decision the commission made in the Utah Power and Light case, didn't buy the distinction. I didn't think that was an EPACT-based decision.

Mr. MCDIARMID. No, they did, in fact, on that remand, say something to the effect of, well, we don't really have to do anything more because Congress made us do it.

Actually that was my view of what Congress had intended so far as I could tell from participating in that progress of that act.

Mr. HASTERT. Ms. Hull.

Ms. HULL. That is exactly what Congress told FERC to do.

Mr. HASTERT. So they are following through on the orders of EPACT?

Ms. HULL. Right. It is an appropriate order.

Mr. SHOLANDER. We would strongly disagree with the FERC's legal analysis which lead it to conclude that it was required to do what it did.

All the EPACT does in section 211 is give QF's the right to apply for wheeling service, but the FERC still must find that such wheeling is in the public interest, and we don't feel that requiring the wheeling of QF power to an unwilling buyer and thus extending the mandatory purchase obligation is in the public interest because it is contrary to the overriding goal of Congress to create a competitive wholesale market, and in this new market the QF's with QF wheeling are now going to be able to be a preferred set of suppliers and that is an anomaly which we feel has to be addressed.

Mr. HASTERT. So you don't think EPACT said that?

Mr. SHOLANDER. They did not mandate the wheeling of QF power to unwilling buyers, they did not.

Mr. HASTERT. In your opinion, again, the panel, just go right down, how do you think the EPACT will affect the relationship between FERC and State commissions? What do you think is going to happen there?

Mr. O'Neil.

Mr. O'NEIL. I think it is going to provide a heck of an inducement to work closer with State commissions, and I think that you have got some Commissioners sitting at 825 now who are fully prepared to do that, one of whom is a former State commissioner.

Mr. MCDIARMID. There are obviously going to be conflicts. There are necessarily going to be conflicts because State commissions are coming at many of these issues from—some State commissions are coming at these issues from a gatekeeper point of view.

We want the customers of our State to have excess profits to reduce the rates that they would otherwise pay retail customers. I have dealt with some of those. That is going to be a conflict.

Ms. HULL. That is right. I don't have anything to add to that.

Mr. SHOLANDER. Because of the potential for conflict, we believe that the States and the Federal Energy Regulatory Commission will work closely together, will coordinate, and we encourage them to do that. The EPACT requires that kind of coordination if its policy objectives are to be implemented.

Mr. HASTERT. One more quick question.

Mr. SYNAR. Let me give it to Mr. Mica, then we will come back to you.

Mr. MICA. Just a quick one.

When Mr. McDiarmid had made a recommendation about notification, required notification, I thought I detected Mr. Sholander's——

Mr. SHOLANDER. My grimace, is that what you noticed?

Mr. MICA. And there was some intimation that it would delay the process.

Mr. SHOLANDER. We don't feel that any applicant before the formal application should be filed should be cut off from having informal discussions with the FERC staff. This is often a good source of information for both sides about potential issues and so on.

Any rights of any intervenor are not foreclosed because such a conversation takes place. Their rights to discovery and so on cer-

tainly are created upon the filing of any application. By the way, that cuts both ways.

People who file complaint cases against utilities under current FERC procedure aren't required to have public notice of their informal meetings with the FERC staff.

Mr. MICA. Thank you. I just want to make an elaboration of the cringe part of the record.

Mr. SYNAR. Mr. McDiarmid, why don't you respond to that?

Mr. MCDIARMID. One of the reasons why they don't have a notification when you file a complaint is that the FERC staff won't have the meetings because they know that there is going to be a contested hearing. It simply does not cut both ways, and after the case is filed or after they know the original case is going to be filed, if you go in to try to talk to the FERC staff, they properly say, oh, you are going to contest that? Well, then it is going to be a contested case and I can't talk to you.

It just does not work both ways. Anything that works fairly is fine, but you can't have something which works in favor of the people who are filing but only when it is a filing to increase somebody else's rates.

Mr. SYNAR. Now, Mr. Hastert.

Mr. HASTERT. To follow up on that, is that part of the bifurcation provisions in FERC that cause that to happen?

Mr. MCDIARMID. No, it is an interpretation of the ex parte proceeding that they have got.

Mr. HASTERT. So ex parte really dictates that that happen, right?

Mr. MCDIARMID. Well, the ex parte, the theory is that Mr. Sholander can go in and talk to the FERC staff because who knows if there is going to be a contested hearing even if it is very, very clear that what he is proposing to do is going to be resisted by all sorts of people because they might not come in; even if it is going to cost them millions, hundreds of millions of dollars, they might not come in.

Well, that is sort of a silly point of view, and it ought to reflect reality.

Mr. HASTERT. One last question I want to go through and ask. We are concerned, being authors of EPACT, do you think in your opinion, I know you all have different opinions on how this thing should play out, but has the Commission delegated enough of its staff or the right amount or what to both an engineering and economic analysis?

Are they doing the right thing to be up and ready to go?

Mr. SHOLANDER. We are not aware of what internal staff allocations they are making or specific plans for hiring. Our concern, one that was discussed earlier today, is that the EPACT places on them a whole new set of responsibilities which requires new expertise, and we certainly encourage the FERC to gain expertise so that they can administer those new responsibilities.

Ms. HULL. We filed several applications under the Energy Policy Act so far this year, and we will probably file several more. So far all have been acted on within the allowed amount of time, but as people say, who knows what floodgates are going to be opened, and I certainly hope FERC is prepared for that.

Mr. McDiarmid. I don't think FERC knows and I don't think anybody really knows what the burden is going to be, and what kind of burden there is going to be. Hiring people who are transmission engineers for the kind of reliability question that is inherently in the act in section 211 is one thing, but I am not at all convinced that those questions are actually going to be brought to FERC.

I think that there is a quite decent chance that these—most of these issues are going to result in being policy questions and economic questions of the sort that they are quite capable of dealing with with essentially the same kind of personnel that they now have.

That will remain to be seen, I think. There are—there are no great floodgates that have been opened thus far. In my perception what we are seeing is that there may not be a great floodgate opening on 211 cases.

Mr. O'Neil. I don't know if the problem will be so much in the nature of 211 and getting transmission service provided in the first instance as much as you go on and you operate the system, there are going to be circumstances that are going to require interruptions of schedules and what will happen to the dispatch center, they are going to have to make some decisions.

Now, if you have layers and layers and layers of contracts stacked one on top of another, whose power do you interrupt, what are the damages downstream? If you are talking what may be tens of millions of dollars in terms of penalties, replacement fuel costs, that is going to lead to disputes, and then the question is will the Commission be able to sort that out, will the Commission in order to be able to sort that out, have to have a better handle on what is going on on a day-to-day basis? I don't know the answer to that question.

I just think it is too early to make a call. I just hope that we don't make the assumption or the Commission doesn't make the assumption that it will be easy and thereby boxes itself to the point that it won't be adequate and won't be capable of taking care of the problems when they do arise.

Mr. Hastert. Finally, Mr. McDiarmid, again, the facts on the ex parte issue, are you implying that ex parte was probably put in there for a very good reason, and when we wrote the Illinois law we copied the ex parte provisions of FERC for Illinois, are you saying that FERC uses that provision sometimes to play games?

Mr. McDiarmid. That may have been true in the past. I am hoping that it is not true at the moment.

Mr. Hastert. Well I am just saying——

Mr. McDiarmid. It is potentially there.

Mr. Hastert. Thank you.

Thank you, Mr. Chairman.

Mr. Sholander. Could I add one thing on that issue?

Mr. Synar. Real quick.

Mr. Sholander. Real quick. Oftentimes it is possible that, as a result of these preliminary discussions, a decision is made not to file a case, and obviously if you have to give notice as you are thinking your way through whether or not the time is right for someone for a case based upon these discussions, it is overly going

to formalize the process to which the ex parte rules technically have not attached because there is no contested proceeding or any proceeding at all before one is actually filed.

Thank you.

Mr. SYNAR. We thank this panel very much. We appreciate your testimony.

Mr. SYNAR. The final witness this morning will be Betsy Moler, Chairman of the FERC. Will you come forward, Betsy. Did you bring some people with you?

Ms. MOLER. I did, but I will see how far I can get without them.

Mr. SYNAR. Do you have any objection to being sworn in?

Ms. MOLER. No, sir, I do not.

[Witness sworn.]

Mr. SYNAR. Welcome. I am glad to have you here. You are a lot better looking than the last chairman we had. I can say that. We will allow your testimony to be made part of the record. At this time we look forward to your first testimony before this subcommittee. It is a new day, a new way, we are glad to have you here, and as I said in my opening remarks, we couldn't find any critics of you, so we will see what happens by the end of this hearing, all right?

STATEMENT OF ELIZABETH ANNE MOLER, CHAIR, FEDERAL ENERGY REGULATORY COMMISSION

Ms. MOLER. Thank you very much, Mr. Chairman and members of the subcommittee. It is indeed a pleasure to be here today. I appreciate your kind remarks in the opening of this session, Mr. Chairman, as well as the kid gloves that have been displayed here by your prior witnesses. I have submitted written testimony.

Mr. SYNAR. They're not dumb, are they?

Ms. MOLER. I do want to focus my comments on what we have done thus far and what we are planning to do in implementing the Energy Policy Act.

Implementing the Energy Policy Act is both an exciting and daunting task. In the Energy Policy Act the Congress made clear that it wants to encourage a competitive bulk power market in this country.

With that in mind, we must now deal with new responsibilities and complex new issues. We are required by the Energy Policy Act to complete two tasks by this October with respect to our electric policy program.

The first was to have regulations in place governing how we will determine whether power producers qualify as exempt wholesale generators, also known as EWG's, and thus become free from the strictures of the Public Utility Holding Company Act.

The Commission, I am proud to say, completed this task 8 months early. We have rules in place that govern this, and we have acted on rehearing. Congress established very specific limited requirements that those seeking EWG status must meet.

We have done the best we can to accommodate very diverse industry financing and leasing arrangements within the bounds of those requirements. The final rule appears to be working well. We have acted on all requests within the 60-day timeframe.

To date, and these are numbers current as of yesterday afternoon, we have had 62 applications filed; we have granted 45, 6 are now pending, 9 have been denied, and 2 have been withdrawn.

Interestingly enough, of the nine that were originally denied, seven were refiled and granted. They restructured their transaction or provided additional detail that was not in the original application. One of those that was withdrawn has also been refiled and granted. Obviously, the program is working.

The second task we must accomplish by October is to have a rule in place requiring utilities to make information concerning their capacity to transmit electric power available to the public. This rule will be a key component in ensuring that transmission will fully support developing competitive generation markets. It will open the black box of information previously available only to transmission owners.

We are analyzing comments on a proposed rule. I expect that we will consider the information rule in September and will clearly meet the target Congress required us to meet.

Apart from the transmission information rule and the EWG rule, the Energy Policy Act raises several other issues that the Commission will consider. You have heard about some of those already today. I will not dwell on them.

The most complex of these is transmission pricing. Our current transmission pricing policy was developed in a series of individual cases. Since becoming Chair of the Commission, and since we have now four new members of the Commission, we have decided to subject that transmission pricing policy to a big pi ture look. We have sought comments on whether we should reform our transmission pricing. We yesterday extended the comment deadline because we put out a very detailed paper seeking a lot of information and posing, I believe, several interesting and complex issues.

The basic issue, however, is whether we should change the basic structure of the transmission pricing rules that have been in place for nearly half a century. We are now in a learning phase on that process. Once we have obtained written information from the electric community, we will hold a technical conference, which is really rather similar to a congressional oversight hearing, to discuss pricing issues and models.

Frankly, I do not know what steps we will take after that. We may undertake a rulemaking, we may develop a policy statement that will open the door to different types of rate filings. We will just have to see. We are, as I said, in the learning phase. We want to seek a broad array of input, and our short-term purpose is to listen and to learn.

Our goal eventually is to reform our transmission pricing as necessary and appropriate to serve the long-term purposes of increased competition, reliability, efficiency and equity after thorough public discussion; something that our pricing policy has not had to date.

Another challenge we face, much discussed today, is implementing the access provisions of the new Energy Policy Act. Under that law, those seeking transmission must first seek a voluntary agreement from a utility at least 60 days before coming to us for a

wheeling order. Once asked, the recipient of the transmission request must respond in writing within that 60-day period.

On July 14, we issued a policy statement that we hope will establish the rules of the road for transmission, those seeking transmission, and those who would be expected to provide the transmission. We did issue this policy statement, it is really a procedural document, after informal conversations with a number of diverse groups within the electric community.

We designed this good faith transmission policy statement to encourage a broad exchange of information between those requesting service and those who might provide it. It should also result in more focused and detailed applications if those seeking transmission eventually come to the Commission.

Obviously, we hope that they will work out voluntary transactions before coming to the Commission and that we will not have to get involved. However, if we do, we are certainly prepared to meet our obligations under the Energy Policy Act to provide that a utility provide wheeling service, if it is determined to be in the public interest, will not negatively affect reliability, and at appropriately designed rates.

To date, we have received only four applications for wheeling orders. We have acted on the first of these last week. It was a case involving Tex-La Electric Cooperative in Texas. We denied that application, finding it was not really a legitimate filing under section 211.

This first action should not, however, be misconstrued. I think I can safely speak for my colleagues when I say that we intend to pursue these filings vigorously. We will endeavor to take initial action on these cases within 90 days of receiving a complete application.

I believe that we must act on these applications in a timely fashion if we are to effectively carry out Congress' intent in this area. We have also undertaken one other relatively minor rulemaking concerning the transmission access provisions. We issued a notice of proposed rulemaking last week addressing who must notify whom when these filings are made. As we gain experience with the access provisions, we will determine whether other generic actions are necessary.

As has been noted already this morning, we are going forward with the regional transmission group proposal. We believe that RTG's offer a flexible regional solution for addressing all of the transmission access issues we have discussed, including pricing. Simply put, we wish to encourage RTG's. Importantly, they may reduce the number of filings to the Commission for wheeling orders.

We issued a policy statement on RTG's on July 30. It was developed after analyzing 100 sets of comments that we received when we sought advice on what we should do with RTG's. I am glad to hear this morning that it is receiving reasonably good reviews, and I want to say that we are excited at the potential of RTG's, properly structured RTG's, which include State commissions at the table. They include transmission owners at the table, they include transmission have-nots at the table, and so forth, and we hope that this potential will be realized.

In our spare time, of course, we continue to perform our traditional responsibilities under the Federal Power Act, the Public Utility Regulatory Policies Act, and the Public Utility Holding Company Act. We still process public utility rate cases, certify QF's, review power marketing rate cases and corporate transactions, including mergers.

In summary, we are working diligently to implement the provisions of the Energy Policy Act of 1992 to help bring to fruition the competitive bulk power markets envisioned by the Congress.

I want to assure the subcommittee that I am personally committed to that goal, and I can say with confidence that my new colleagues are, too. In addition, we are trying to improve our procedures and processes, and we have viewed with interest the GAO report.

I would note, for example, the key indicator case tracking system that GAO has called upon us to look closely at and to make some changes in. Even before the GAO report was issued we had begun development of an entirely new case tracking system. KICT's, as it is affectionately known, is a mainframe system, it is antiquated.

Mr. SYNAR. That saved you a whole bunch of questions.

Ms. MOLER. Good. I am very anxious for you to get home for the August recess, sir.

We hope to develop a good, new LAN-based system that will use the personal computer base that we have in the Commission, and we are exploring the feasibility and how to change it and so on and so forth. With any luck at all, we will have a new system, an entirely new system, in place by 1995.

These tasks are not easy, but we have made and are continuing to make significant progress in changing our approach to regulation in this very dynamic competitive era.

Thank you. I appreciate your interest and your continuing interest in what it is that we are up to, and I will be happy to respond to any questions you may have.

[The prepared statement of Ms. Moler follows:]

Testimony of
Elizabeth Anne Moler
Chair of the
Federal Energy Regulatory Commission

Before the
Subcommittee on Environment, Energy
and Natural Resources
United States House of Representatives
August 6, 1993

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here this morning to discuss the Federal Energy Regulatory Commission's electric power program. I would like to describe to you the major substantive and procedural issues facing the program, and the progress we are making in addressing those issues. In particular, I would like to focus on the Commission's implementation of the Energy Policy Act of 1992.

The Commission is facing the exciting but daunting task of implementing the electric provisions of the Energy Policy Act of 1992. Through those provisions, Congress has made it clear that it wants to encourage a competitive bulk power market in this country. By allowing the Commission to exempt certain wholesale power producers from the Public Utility Holding Company Act, and by expanding the Commission's authority to order transmission under the Federal Power Act, Congress has provided the Commission with new tools to help make this happen.

The Commission must now deal with new responsibilities and new issues. The complexity of the issues is enormous. I hope

and believe we are laying a solid foundation for dealing with the issues ahead of us in a comprehensive, thoughtful manner. I will focus my testimony today on the progress being made as we implement the new legislation.

The Energy Policy Act requires the Commission to complete two tasks by October 24 of this year. The first is to promulgate rules governing how we will determine whether applicants seeking exempt wholesale generator (EWG) status meet the requirements of new section 32 of the Public Utility Holding Company Act. The Commission completed this task eight months early. On February 10, 1993, the Commission issued a final rule providing filing requirements and ministerial procedures for persons seeking EWG status. An order on rehearing of the rule was issued April 14, 1993.

There is no doubt that the electric utility industry is responding to the opportunities in the new legislation. The list of wholesale generators seeking EWG status has grown steadily. As of August 3, 1993, the Commission had received 62 applications for EWG status. More detailed statistics on EWGs are included in Appendix A. The applicants include EWGs both in the United States and in foreign countries. All EWG applications have been acted on within the 60-day statutory time limit. Congress established very specific requirements those seeking EWG status must meet. We have done the best we can to accommodate very

diverse industry financing and leasing arrangements within the bounds of those requirements. The final rule appears to be working well.

The second task required by the new legislation is promulgation of a rule concerning transmission information. Under the new section 213(b) of the Federal Power Act (FPA), the Commission must promulgate a rule requiring transmitting utilities to submit information annually to inform potential transmission customers, state regulatory authorities, and the public of potentially available transmission capacity and known constraints. The Commission issued a notice of proposed rulemaking on section 213(b) on March 30, 1993. Parties in the proceeding were granted an extension of time to June 21, 1993, in which to file comments. We received 117 sets of comments. The Commission will consider a final rule in September. This rule will be a key component in developing competitive generation markets because it will open the "black box" of information which previously was available only to transmission owners.

We have also begun to work on several other issues that are important to our overall plans to promote an efficient, reliable and competitive bulk power market. Perhaps the most complex of these is transmission pricing. This subject, of course, goes well beyond the new legislation. Whether transmission is ordered under the new section 211, is voluntary under section 205, or is

a condition of merger approval under section 203 of the FPA, the pricing of transmission must be consistent and coherent. In light of the fundamental changes occurring in the industry, the increasing number of voluntary open access tariffs being filed with the Commission, and the new authority to order access under section 211, as well as the new section 212 pricing provisions, the Commission has undertaken a public inquiry on this critical subject.

On June 30, 1993, the Commission issued a notice of technical conference and request for public comments on the technical, policy and legal aspects of transmission pricing reform. This inquiry is a comprehensive one. It is an inquiry into whether fundamental changes should be made in the historic pricing practices of the past half-century. This includes an inquiry into distance-sensitive rates, pricing of actual as opposed to contract power flows, spot pricing, and numerous other issues. A threshold question is whether the Commission's present pricing policy promotes or discourages efficiency and competition in the wholesale electric generation market.

This transmission pricing inquiry is a first step in learning what the options are, and the merits of each, for pricing transmission services. To put it simply, we are in a learning phase. We want to gather as much information and thought as possible, and involve as many in the industry as

possible, in assessing potential reform. Once we have obtained written input from the electric community, we will hold a technical conference which allows as much give and take discussion as possible. Frankly, I do not know what step we will take after that. We may undertake a rulemaking. Or we may develop a policy statement outlining different pricing models we would accept if filed. Our short-term purpose is to listen and to learn. Our goal is to reform our transmission pricing as necessary and appropriate to serve the long-term purposes of increased competition, reliability, efficiency and equity, on the basis of thorough public discussion and forethought.

The Commission has begun to address procedural issues arising from newly amended section 211(a) of the FPA and the new section 213(a) of the FPA. Section 211(a) gives us new authority to require utilities to transmit power for others, and section 213(a) requires utilities to respond to transmission requests. On July 14, 1993, the Commission issued a policy statement concerning requests for transmission services, and responses by transmitting utilities. The policy statement lets transmission users and providers know the minimum elements of a good faith transmission request and response. We issued this policy statement after the staff obtained informal input from representative segments of the electric community, including both transmission owners and transmission users.

The policy statement is particularly important because, under the new transmission provisions, two separate 60-day clocks are triggered once a transmission request is made to a transmitting utility. First, the Commission may not order transmission services under section 211 unless the applicant has made a request for such services to the transmitting utility at least 60 days prior to filing an application with the Commission. Second, under section 213(a), if a transmitting utility does not agree to provide wholesale transmission services pursuant to a good faith request, at rates, terms and conditions acceptable to the requestor, the utility is required to respond in writing to the requestor within 60 days.

In issuing the policy statement on good faith transmission requests and responses, the Commission has treated sections 211 and 213 in a complementary fashion. In addition, the minimum elements of a good faith request and response were developed to encourage a broad exchange of information between transmission users and providers, before section 211 applications are filed. This exchange of information will permit transmission requestors to file more focused and detailed applications under section 211(a) and will allow the Commission to expedite section 211(a) applications. Importantly, it may also help to encourage negotiated agreements between parties, such that section 211(a) applications need not be filed.

Thus far, the Commission has received four applications under section 211(a). These are listed in Appendix A. The Commission acted on the first of these, involving Tex-La Electric Cooperative and Texas Utilities, on July 29, 1993. Although this first application received considerable attention by the public, we determined it was not a legitimate filing under section 211. The Commission rejected the application because in actuality it was a request to resolve a billing dispute, rather than a request for "transmission services" under section 211(a).

This first section 211 decision should not be misconstrued. I think I can safely speak for the other members of the Commission when I say that we intend to pursue section 211 filings vigorously in order to assure the pro-competitive results intended by Congress. We will endeavor to take initial action on these cases within 90 days of receiving a complete application. I believe that the Commission must act on 211 applications in a timely fashion if we are to effectively carry out Congress' intent in amending the section.

The Commission has also instituted one other generic proceeding concerning section 211. On July 27, 1993, the Commission issued a notice of proposed rulemaking (NOPR) to address the notice requirement for section 211 applications. Section 211(a) provides that notice must be provided to each state regulatory authority, electric utility, and federal power

marketing agency that would be affected by the wheeling application. The proposed rule would require section 211 applicants to provide actual notice to these entities.

As we gain experience with section 211 applications, we will determine whether other generic actions are necessary. In the meantime, we are well aware that actions in individual cases may have precedential effects for other section 211 applications. That is why we adopted a very liberal intervention policy in the Tex-La section 211 case.

Another major area in which the Commission has taken action concerns regional transmission groups, or RTGs. Simply put, we want to do what we can to encourage the development of properly structured RTGs. RTGs offer a regional solution for addressing all of the transmission issues I've mentioned so far, including pricing, as well as issues concerning transmission planning and reliability. Properly functioning RTGs will enable the market for electric power to operate in a more competitive, and thus more efficient, manner. In addition, they may substantially reduce the number of section 211 filings brought to the Commission. Because of the enormous potential of RTGs, on July 30, 1993 we issued a policy statement encouraging RTGs and providing guidance on the minimum components of an RTG agreement. This policy statement was developed after analyzing 100 sets of comments received in response to the consensus legislative

proposal presented to Congress last fall, and after monitoring the progress which has occurred in negotiating RTGs in various regions of the country during the past six months.

We do not have authority to "certify" RTGs, as contemplated by the consensus legislative proposal. However, we do have the authority, and indeed the responsibility, to determine whether agreements affecting or relating to transmission in interstate commerce by public utilities, and the rates for such transmission, meet the standards of the FPA. Thus, most RTG agreements will have to be filed with the Commission under section 205 of the FPA. The policy statement provides guidance as to what is needed to obtain Commission acceptance of an RTG under section 205. It is written to give maximum flexibility for the development of RTGs in various regions of the country, and at the same time to assure that the purposes of the Energy Policy Act are met. The policy statement also invites proposals for Commission deference to decisions reached voluntarily under an RTG or reached pursuant to an alternative dispute resolution process under an RTG. I am hopeful that the Commission will soon begin to receive comprehensive RTG agreements.

As indicated in each of the topics I've discussed, the Commission is attempting to implement the Energy Policy Act and address related issues with full opportunity for input from all segments of the electric community. This includes traditional

electric utilities, non-traditional generators such as EWGs and QFs, municipalities and electric cooperatives, consumer groups, and, importantly, state regulatory authorities. We will continue to seek advance input from those affected by our regulations when we can as we implement the electric provisions of the Energy Policy Act.

In addition to devoting substantial resources to address the major issues surrounding an emerging new electric industry, the Commission's electric program must continue to meet its traditional regulatory responsibilities. These include traditional public utility rate cases, certification of QFs, rates for power marketing administrations and the Bonneville Power Administration, and corporate mergers and dispositions of jurisdictional facilities.

Of these traditional regulatory areas, we have seen significant growth in recent years in both rate filings and in corporate transactions, including mergers. For example, rate filing applications increased from 655 in FY 1991 to 820 in FY 1992. Corporate transaction applications increased from 21 in FY 1991 to 25 in FY 1992 (four of these involved public utility mergers). We project almost 1,000 rate applications and 25 corporate transaction applications for FY 1993. The increased activity in recent years in corporate mergers is particularly important because of the complexity of these cases and because of

the impact of mergers on competition in the electric industry. The Commission must analyze potential anticompetitive impacts of a merger, the conditions, if any, that would mitigate those impacts, and other public interest factors that must be balanced. Under the FPA, the Commission "shall" approve a merger if "consistent with" the public interest. Under case law, this is interpreted not as a finding of improvement to the public interest, but rather as a finding of compatibility with the pre-merger status quo. This is a fact-ridden inquiry which requires intensive use of resources.

As a result of the growth we are seeing in our traditional workload, and the additional workload that will emerge from Energy Policy Act implementation, the Commission has requested an increase in the staffing for our electric program in the 1994 budget. We are making cuts in staffing levels in other areas in order to accommodate increased staffing in the electric programs. The Office of the General Counsel currently has 53 people (including 9 support staff) working on electric matters. Of these, 32 people work in an advisory capacity and 21 work on litigation matters. We do not currently plan an increase in electric staff for OGC in FY 1994. The Office of Electric Power Regulation is authorized to have 125 people (including 15 support staff) in FY 1993. We now have 114 and, of these, 71 people work in an advisory capacity and 43 work on litigation matters. We have asked for an increase to 130 people in FY 1994.

It is possible that the Commission may need additional resources in the future to handle Energy Policy Act implementation, but it is difficult at this time to accurately predict future needs. It does not appear that we will need additional resources to handle EWG applications, or to handle increased requests for market-based rates. The uncertain area involves transmission access applications under section 211.

There are two major factors that could influence the number of section 211 applications. First and most important, the formation of RTGs, and voluntary agreements or ADR processes within RTGs, could significantly reduce the number of section 211 applications. Second, the wider availability of transmission information under the section 213(b) information rule, and through transmission requests and responses under sections 211(a) and 213(a), may increase the ability of transmission users to negotiate consensual transmission arrangements, rather than file section 211 applications.

In the event RTGs do not develop as we hope, and transmission owners and users are not able to voluntarily negotiate acceptable arrangements, the Commission could be faced with a large number of very complex section 211 proceedings. The Commission does not have extensive experience in section 211 proceedings. Although section 211 has existed since 1978, the only order requiring service under the section involved a

settlement. In addition, section 211 as amended now includes the responsibility to analyze impacts on reliability. We do have staff with substantial expertise in dealing with the technical issues likely to arise in section 211 proceedings. However, these technical resources are limited in number. Our staff will have to increase, and we will have to seek persons with particular expertise if we have to deal with a significant number of section 211 applications.

As noted, thus far only four applications have been filed for transmission services under section 211. We rejected the first of these because the applicant did not request transmission services. The staff is now analyzing the other three pending applications. As we gain experience with these, and as we monitor the development of RTGs, we can better analyze our resource needs. We will not hesitate to seek additional resources if we believe we cannot effectively carry out the new statute. At this time, as estimated in our budget request for fiscal year 1994, we anticipate needing five additional FTE's for our technical staff. That is a very modest increase when you consider our new responsibilities.

In addition to closely monitoring future resource needs, we are seeking ways to expedite Commission decisions with existing resources. First, we are attempting to improve our processing of cases and our case tracking system. As requested by the

Subcommittee, attached Appendix B contains an outline of our procedures for reviewing and acting on the principal forms of electricity proceedings that come before us, as well as an analysis of the status of the Commission's Key Indicator Case Tracking System (KICTs). Second, ccnsistent with past policy, we are encouraging consensual resolutions through negotiation, as well as alternative means of dispute resolution. As discussed earlier, this may be a key aspect of RTGs. In regard to ADR, I am confident that for the electric program as well as other regulatory areas in the Commission's jurisdiction, we can more formally implement ADR in the coming year. Third, consistent with the GAO recommendation, we will be reviewing our regulations and processes to determine how to ensure better developed applications in all major electric regulatory areas. We will consider various ways to disseminate to the industry at large more specific information concerning what needs to be incorporated in applications filed with us.

In summary, we are working diligently to implement the electric provisions of the Energy Policy Act of 1992, to help bring to fruition the competitive bulk power markets envisioned by Congress. I want to assure the Subcommittee that I am personally committed to that goal and I can say with confidence that my new colleagues are, too. In addition, we are trying to improve our procedures and processes so that we can expedite cases and provide more regulatory certainty to those we regulate.

The task is not an easy one, but we have made and are continuing to make significant progress.

In addition to this general testimony, I have included in Appendix C responses to specific topics raised in the Subcommittee's letter of July 21, 1993.

This concludes my remarks. I would be happy to answer any questions the Subcommittee may have.

Appendix A

Applications for Exempt Wholesale Generator Status

Summary of Commission Action as of August 3, 1993

Filed:	62
Granted:	44
Denied:	9
Withdrawn:	2
Pending:	7

No.	Applicant	Docket No.	Comm. Action	Cite	Location	Size	Fuel	Aff.	Oper.	QF
1	Commonwealth Atlantic Limited Partnership	EG93-1-000	grant	61 FERC ¶ 61,270	Chesapeake, VA	310 MW	gas	Y	Y	N
2	Doswell Limited Partnership	EG93-2-000	grant	61 FERC ¶ 61,325	Hanover County, VA	663 MW	gas	?	Y	N
3	Hartwell Energy Limited Partnership	EG93-3-000	grant	61 FERC ¶ 61,283	Hartwell, GA	300 MW	gas	Y	N	N
4	Costanera Power Corporation	EG93-4-000	grant	61 FERC ¶ 61,335	Buenos Aires, Argentina	1260 MW	gas/oil	Y	Y	N
5	Nevada Sun-Peak Limited Partnership	EG93-5-000	grant	62 FERC ¶ 61,116	Las Vegas, NV	210 MW	?	Y	Y	N
6	Bald Eagle Power Company, Inc.	EG93-6-000	grant	62 FERC ¶ 61,159	Long Island, NY	1000 MW	tidal	N	N	N
7	Richmond Power Enterprise, L.P.	EG93-7-000	grant	62 FERC ¶ 61,157	Richmond, VA	250 MW	?	Y	?	Y
8	Entergy Richmond Power Corporation	EG93-8-000	grant	62 FERC ¶ 61,157	Richmond, VA	250 MW	?	Y	?	Y
9	Entergy Power Development Corporation	EG93-9-000	grant	62 FERC ¶ 61,157	Richmond, VA	250 MW	?	Y	?	Y
10	KFM Pepperell, Inc.	EG93-10-000	deny	62 FERC ¶ 61,182	Pepperell, MA	36 MW	gas	N	Y	N
11	Pepperell Power Associates Limited Partnership	EG93-11-000	grant	62 FERC ¶ 61,182	Pepperell, MA	36 MW	gas	N	Y	N
12	Malacha Hydro Limited Partnership	EG93-12-000	grant	62 FERC ¶ 61,184	Lassen County, CA	30 MW	hydro	Y	Y	Y
13	InterAmerican Energy Leasing Company	EG93-13-000	deny	62 FERC ¶ 61,283	Mamonal, Columbia	100 MW	gas	N	N	N
14	Louis Dreyfus Electric Power Inc.	EG93-14-000	deny	62 FERC ¶ 61,234	Wilton, CT	?	?	N	?	N
15	MW Energy (Williams Lake) Limited Partnership	EG93-15-000	deny	62 FERC ¶ 61,235	Williams Lake, Canada	60 MW	wood	Y	N	N
16	JMC Ocean State Corporation	EG93-16-000	grant	62 FERC ¶ 61,300	Burrillville, RI	250 MW	gas	Y	Y	N
17	YCPL Power Ltd.	EG93-17-000	grant	62 FERC ¶ 61,300	Burrillville, RI	250 MW	gas	Y	Y	N
18	LG&E Power 20 Incorporated	EG93-18-000	grant	63 FERC ¶ 61,024	(purchaser is JCP&L)	110-130 MW	gas	Y	N	N
19	WEL Energy Group Limited	EG93-19-000	w/drawn		Waikato, New Zealand	?	?	Y	Y	N
20	Southern Electric Wholesale Generators, Inc.	EG93-20-000	deny	63 FERC ¶ 61,050	Oahu, HA; King George County, VA	209 MW 200 MW	oil coal	Y Y	Y ?	Y N
21	Jersey Generating Company, L.P.	EG93-21-000	grant	63 FERC ¶ 61,059	NJ	170 MW	gas	Y	N	N
22	SEI Birchwood, Inc.	EG93-22-000	deny	63 FERC ¶ 61,050	King George County, VA	200 MW	coal	Y	?	N
23	Birchwood Development Corp.	EG93-23-000	deny	63 FERC ¶ 61,050	King George County, VA	200 MW	coal	Y	?	N
24	Birchwood Power Partners, L.P.	EG93-24-000	deny	63 FERC ¶ 61,050	King George County, VA	200 MW	coal	Y	?	N
25	SEI Hawaiian Cogenerators, Inc.	EG93-25-000	deny	63 FERC ¶ 61,050	Oahu, HA	209 MW	oil	Y	Y	Y

No.	Applicant	Docket No.	Comm. Action	Cite	Location	Size	Fuel	Aff.	Oper.	QF
26	Enron Milford Operating Corp.	EG93-26-000	grant	63 FERC ¶ 61,063	Milford, MA	149 MW	gas	Y	N	N
27	Milford Power Limited Partnership	EG93-27-000	grant	63 FERC ¶ 61,063	Milford, MA	149 MW	gas	Y	N	N
28	Blue Mountain Power, L.P.	EG93-28-000	grant	63 FERC ¶ 61,064	Bucks County, PA	?	gas	N	N	N
29	Century Power Corporation	EG93-29-000	grant	63 FENC ¶ 61,065	Farmington, NM	?	coal	N	Y	N
30	Crown Energy, L.P.	EG93-30-000	grant	63 FERC ¶ 61,061	West Deptford, NJ	181 MW	coal	N	N	N
31	Vista Energy, L.P.	EG93-31-000	grant	63 FERC ¶ 61,058	West Deptford, NJ	181 MW	coal	N	N	N
32	South Brunswick CoGen, L.P.	EG93-32-000	grant	63 FERC ¶ 61,052	Middlesex County, NJ	120-170 MW	?	N	N	N
33	NW Energy (Williams Lake) Limited Partnership	EG93-33-000	grant	63 FERC ¶ 61,150	Williams Lake, Canada	60 MW	wood	Y	N	N
34	Clearfield Partners, L.P.	EG93-34-000	grant	63 FERC ¶ 61,202	Cooper Township, PA	166 MW	coal	N	N	N
35	Pemberton Power Limited Partnership	EG93-35-000	grant	63 FERC ¶ 61,060	Pemberton, NJ	90-160 MW	?	N	N	N
36	Elm Energy & Recycling (UK) Limited	EG93-36-000	grant	63 FERC ¶ 61,201	West Midlands, England	25 MW	rubber tires	Y	N	N
37	Wallkill Generating Company, L.P.	EG93-37-000	grant	63 FERC ¶ 61,258	NY	150 MW	gas	Y	N	N
38	SEI Hawaiian Cogenerators, Inc.	EG93-38-000	grant	63 FERC ¶ 61,261	Oahu, HA	209 MW	oil	Y	Y	Y
39	Birchwood Development Corp.	EG93-39-000	grant	63 FERC ¶ 61,261	King George County, VA	222 MW	coal	Y	N	N
40	Birchwood Power Partners, L.P.	EG93-40-000	grant	63 FERC ¶ 61,261	King George County, VA	222 MW	coal	Y	N	N
41	Southern Electric Wholesale Generators, Inc.	EG93-41-000	grant	63 FERC ¶ 61,261	Oahu, HA King George County, VA	209 MW 222 MW	oil coal	Y Y	Y N	Y N
42	SEI Birchwood, Inc.	EG93-42-000	grant	63 FERC ¶ 61,261	King George County, VA	222 MW	coal	Y	N	N
43	Central Termica Alto Valle S.A.	EG93-43-000	grant	63 FERC ¶ 61,264	Neuquen, Argentina	98 MW	steam/ gas	Y	Y	N
44	Dominion Management Argentina S.A.	EG93-44-000	w/drawn		Neuquen, Argentina	98 MW	steam/ gas	Y	Y	N
45	Belize Electric Company Limited	EG93-45-000	grant	63 FERC ¶ 61,267	Cayo, Belize	24 MW	hydro	Y	N	N
46	Richmond Generating Company, L.P.	EG93-46-000	grant	63 FERC ¶ 61,300	GA	330-342 MW	gas	Y	N	N
47	Muscogee Generating Company, L.P.	EG93-47-000	grant	63 FERC ¶ 61,300	GA	224-226 MW	gas	Y	N	N
48	Naralmon Generating Company, L.P.	EG93-48-000	grant	63 FERC ¶ 61,300	GA	320-332 MW	gas	Y	N	N
49	Clarke Generating Company, L.P.	EG93-49-000	grant	63 FERC ¶ 61,300	GA	327-338 MW	gas	Y	N	N

No.	Applicant	Docket No.	Comm. Action	Cite	Location	Size	Fuel	Aff.	Oper.	QF
50	AES San Nicolas, Inc.	EG93-50-000	grant	63 FERC ¶ 61,299	San Nicolas, Argentina	650 MW	?	Y	Y	N
51	Central Termica San Nicolas, S.A.	EG93-51-000	grant	63 FERC ¶ 61,298	San Nicolas, Argentina	650 MW	?	Y	Y	N
52	InterAmerican Energy Leasing Company	EG93-52-000	grant	64 FERC ¶ 61,038	Mamonal, Columbia	100 MW	gas	N	N	N
53	Dominion Management Argentina, S.A.	EG93-53-000	grant	64 FERC ¶ 61,078	Neuquen, Argentina	98 MW	gas	Y	Y	N
54	Great Bay Power Corporation	EG93-54-000	grant	(voted July 29)	Seabrook, NH	1,150 MW	nuclear	N	Y	N
55	Tenpeak Corporation	EG93-55-000	pending		Clark County, NV	132 MW	gas	N	N	Y
56	Las Vegas Energy Storage Limited Partnership	EG93-56-000	grant	(voted July 29)	Jean, NV	100-200 MW	hydro	N	N	Y
57	Westmoreland - LG&E Partners	EG93-57-000	pending		Weldon Township, NC	165-167 MW	coal	N	Y	Y
58	Hidroelectrica Cerros Colorados, S.A.	EG93-58-000	pending		Neuquen, Argentina	450 MW	hydro	N	Y	N
59	Blue Diamond Power Partners, L.P.	EG93-59-000	pending							
60	Dominion Management Argentina, S.A.	EG93-60-000	pending							
61	Hidroelectrica El Chocon, S.A.	EG93-61-000	pending							
62	Lakewood Cogeneration, L.P.	EG93-62-000	pending		Lakewood Township, NJ	238 MW	gas	Y	N	N

Applications for Mandated Transmission Services
(Section 211 of the FPA)

Summary of Commission Action as of August 3, 1993

Filed:	4
Granted:	0
Denied:	1
Withdrawn:	0
Pending:	3

No.	Docket Number	Applicant	Transmitter	Type of Service	Comment Date	Commission Action
1	TX93-1-000	Texas-La Electric Cooperative of Texas, Inc.	Texas Utilities Electric Company	Point-to-Point	3/15/93	denied (7/29/93)
2	TX93-2-000	City of Bedford, Virginia, et al.	American Electric Power Company, Inc.	Point-to-Point	7/26/93	
3	TX93-3-000	Wisconsin Electric Power Company	Upper Peninsula Power Company	Point-to-Point	8/10/93	
4	TX93-4-000	Florida Municipal Power Agency	Florida Power & Light Company	Network	8/23/93	

Appendix B

1) Outline of procedures for reviewing and acting on principal forms of electricity proceedings.

The chart following page 2 of this appendix identifies the procedures for reviewing and acting on the primary form of electric proceedings -- rate filing applications. These procedures are fairly consistent across all of the Commission's electric workload areas, except for EWGs and QFs. EWG applications are acted on by the Commission within 60 days, and the majority of QFs self-certify with no Commission action taken.

2) Status of KICTS and any improvements made in response to GAO or prior Subcommittee recommendations.

The Natural Gas hearing based on the General Accounting Office Report, "Natural Gas: Factors Affecting Approved Times for Construction of Natural Gas Pipelines," contained a number of recommendations on improving KICTS.

Specifically, the GAO report Recommendation 3, to amend the Key Indicator Case Tracking System (KICTS), was to:

1) retain original and subsequent target milestone and completion dates; and

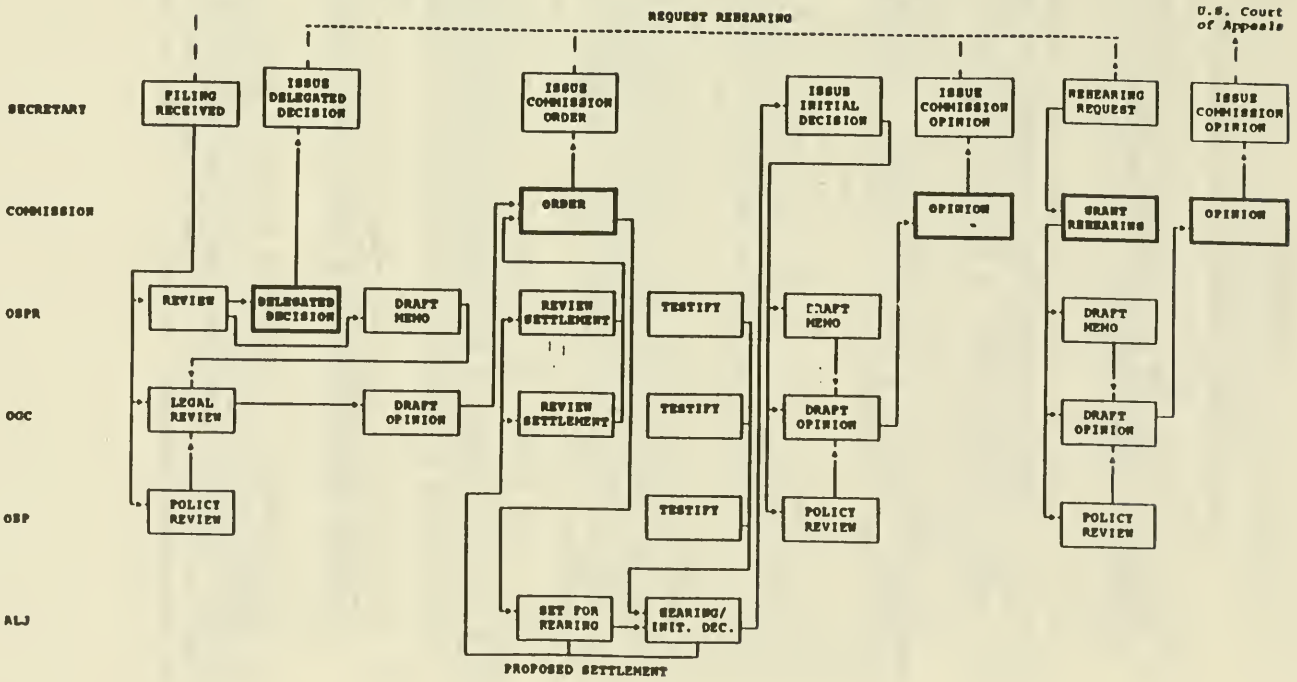
2) capture the timing of industry responses to FERC's data requests and the performance of federal agencies in meeting dates established for completing environmental reviews.

In response, on March 16, 1992, the Commission implemented revisions to the KICTS system which allow staff to:

- retain the original and subsequent target completion dates and Commission action, including the reason for change;
- identify cases involving construction of facilities and track construction characteristics;
- track deficiency letters (source and response due date) and responses (date received and full/partial response indicator);
- track "projects" involving multiple applicants and dockets, including designation of lead docket;
- track "phased" proceedings; and
- indicate the type of environmental review required (EA/EIS/Categorical Exclusion) and date of completion.

The Commission currently is developing a functional requirements document (FRD) to identify specific needs for a system to replace KICTS. We anticipate having the FRD completed before the end of 1993. We have long known there were deficiencies with KICTS and have taken actions to correct these deficiencies, including those cited above in response to the earlier GAO study. The CFO Act and other developments have made additional enhancements to KICTS appear not to be cost effective. Therefore, we are studying the development of an entirely new system. We anticipate a new system could be put in place during 1995. As a replacement system is not yet fully defined, the cost and the actual timing of implementation is not known.

Rate Filing Application - Process Flow



Appendix C

Specific Topics Raised By the Subcommittee

(1) Any analysis the Commission has made of the resource needs required to implement EPACT, including specific types of new personnel, if any, required.

As discussed in the general testimony, the Commission is undertaking a number of initiatives to implement the Energy Policy Act, and is continuing to evaluate staffing needs. At this time it is very difficult to realistically identify either the quantity or type of resources that may be needed.

We are experiencing continuing increases in traditional electric workload and are staffing the electric program areas accordingly. We are making cuts in staffing levels in other areas in order to accommodate increased staffing in the electric programs. The Office of the General Counsel currently has 53 people (including 9 support staff) working on electric matters. Of these, 32 people work in an advisory capacity and 21 work on litigation matters. We do not currently plan an increase in electric staff for OGC in FY 1994. The Office of Electric Power Regulation is authorized to have 125 people (including 15 support staff) in FY 1993. We now have 114 and, of these, 71 people work in an advisory capacity and 43 work on litigation matters. We have asked for an increase to 130 people in FY 1994. OEPR has proposed to increase its ceiling by 5 more in FY 1995 to accommodate the new workload requirements of the Energy Policy Act. This request is being reviewed but I will probably not be able to make a decision on whether this is too much or not enough for some time.

To a large extent, the programmatic resource needs will be dependent upon factors discussed in the general testimony that may mitigate the impact of 211 filings on the electric program. These are: (1) good faith transmission requests and responses; (2) RTGs; and (3) availability of transmission information.

(2) Any proposals or approaches suggested by FERC for improving the state-FERC relationship and dealing with the split nature of jurisdiction over electricity regulation.

The Commission in recent years has used a number of formal and informal means of consulting with, and having substantive discussions with, state commission members on issues of mutual concern. Commission and staff members participate in National Association of Regulatory Utility Commissioners (NARUC) committee and subcommittee meetings. In addition, in 1991 the Commission

held a public conference with NARUC on major issues affecting the electric utility industry. Subsequently it held workshops with NARUC on topics including market-based pricing, integrated resource planning, and Clean Air Act compliance.

Some state commissions advocate the use of joint boards or joint hearings under section 209 of the Federal Power Act. These have been used infrequently because they can cause significant regulatory delay and expense. Because state input is encouraged through intervention and participation in individual FERC proceedings in any event, it has been rare that the Commission has felt the increased time and cost would justify a joint board.

While joint boards may be appropriate in special circumstances, other alternatives are being explored. For example, a recent oil pipeline case, Trans Alaska Pipeline System, et al., 63 FERC ¶ 61,145 (1993), involved competing rulings by the Alaska Public Utility Commission and FERC. After consultation with the Alaska Commission, the FERC directed its chief administrative law judge to appoint a settlement judge to convene a conference to seek an overall common resolution of the issues.

(3) A concise discussion of the economic philosophy employed, if any, by FERC in deciding electricity matters, and how this relates to specific electric power applications.

The Commission's policy in recent years has been to allow market forces to set the price of wholesale electricity in situations in which the seller cannot exercise significant market power over the buyer and there are no potential abuses arising from affiliations with traditional public utilities, or there is a cost-based ceiling. The Commission must, of course, ensure that rates fall within a zone of reasonableness under the Federal Power Act.

(4) The current status and future plans for dealing with the issue of regional transmission groups and whether their use would result in more efficient resolution of transmission disputes.

A discussion of this topic is contained in the general testimony.

(5) **Discussion of proposed changes to the SEC-FERC relationship and whether the legislation proposed by Senator Bumpers would increase the efficiency of existing practices or present an undue burden on FERC.**

On May 25, 1993, I testified before the United States Senate Committee on Energy and Natural Resources concerning Senator Bumpers' proposed S. 544, the Multistate Utility Company Consumer Protection Act of 1993, and Senator Bumpers' amendment to S. 544. I support amendments to the FPA that would restore the FERC's ability to regulate the rates of public utility members of registered holding companies in the same way that it regulates the rates of all other public utilities. While certain technical revisions may need to be made to S. 544, I fully support the intent of the bill.

If a version of S. 544 is enacted, it would result in a more efficient regulatory system since the FERC already has the resources, expertise, and procedures to address rate-related issues such as affiliate purchase costs, and the SEC does not. In addition, the FERC has refund authority, and the SEC does not. There would be no undue burden on FERC since FERC performs this rate review for all other public utilities.

I do not take a position on the proposal to transfer the Public Utility Holding Company Act functions to the FERC. The SEC has much greater experience in that area and thus more expertise to bring to bear in making a recommendation.

(6) **The role of the Public Utility Regulatory Policies Act after the passage of EPACT and in an era of increasing free market approaches, such as bidding, for power purchases.**

Because the Energy Policy Act allows certain wholesale generators to obtain an exemption from PUHCA and does not impose any size or other technology restrictions on exempted generators, as is the case with QFs under PURPA, one of the major advantages of being a QF under PURPA has been eliminated. The major remaining advantage for QFs is that electric utilities are obligated to purchase QF power at no higher than avoided cost. (QFs also have the right to back-up power, which EWGs do not.) QFs may continue to have an advantage in states that administratively determine avoided cost. However, as states increasingly turn to all-source competitive bidding to determine avoided cost, the mandatory purchase requirement also loses its advantages; unless a QF can compete on price in a competitive bid, its power will not be chosen. To the extent that QFs represent diverse technologies and can compete on price in a competitive bidding situation, they will continue to be viable

suppliers.

It should be noted that although QFs and EWGs must meet different requirements, they are not mutually exclusive requirements. An entity can be both a QF and an EWG if it can meet the specific requirements for each.

(7) The relationships of municipally and cooperatively owned utilities to FERC after the passage of EPACT.

Municipally owned utilities and most electric cooperative utilities are not public utilities under the FPA and therefore are not subject to the FERC's section 205 rate jurisdiction, or its non-rate jurisdiction. However, these entities are subject to the FERC's jurisdiction under the newly amended section 211 of the FPA, as well as the Commission's interconnection authority under section 210. The Commission can order municipals and cooperatives to provide transmission services under section 211 and determine the rates for such services in accordance with section 212.

However, municipals and cooperatives are jurisdictional only for purposes of sections 210 and 211. They do not otherwise become public utilities subject to FERC's jurisdiction under other provisions of the FPA. This is because section 201(b)(2) (which existed prior to passage of the Energy Policy Act) provides that compliance with any order of the Commission under section 210 or 211 shall not make an entity subject to jurisdiction of the Commission for any purposes other than carrying out the provisions of sections 210, 211 and 212.

(8) The use of case-by-case decision-making to deal with broad classes of cases instead of the use of general rulemakings, and whether this denies due process rights to those who are not parties to the original application but who might be bound by the precedents established.

It is well established that the Commission may act lawfully either by generic rulemaking or case-by-case. Due process rights are protected as long as the Commission bases its decision on a properly made, and adequate, record.

The Commission continually has to balance the need to act as expeditiously as possible on individual cases (some of which must be acted on within statutory deadlines), with the concern that major policy decisions with generic implications not be made without obtaining input from the electric industry and other affected entities. The Commission has attempted to strike a

careful balance in the electric area and recently has undertaken several generic electric initiatives (e.g., a transmission pricing inquiry, a policy statement on RTGs). In addition, in its first order involving an application under the newly amended section 211, the Commission allowed very liberal intervention because of the precedential implications of the case.

Mr. SYNAR. Well, it would be nice at this point to adjourn and say that we had no questions and let you off for August, but, no. We will be back. We have to vote. We will be back in about 5 minutes. We are in recess, not adjourned.

[Recess taken.]

Mr. SYNAR. The subcommittee will come back to order.

I guess the natural place to start is to give you an opportunity to respond to the testimony of Mr. Russell. Is there anything you would like to add to what he said or comment on that?

Ms. MOLER. We have worked very hard to communicate effectively and often with our colleagues in NARUC. I am interested in the fact that they now recognize the existing joint board mechanism is really basically unworkable. We have not used joint boards because of that. We have in individual cases a variety of ex parte concerns where States are also participants in those cases and intervenors in those cases. They are now trying to avoid that issue by saying they want to talk and have a special participant status with respect to rulemakings. I don't know whether that is—obviously, new legislation would be required to do precisely what NARUC is seeking. I don't know what the prospects are there. You know better than I. But we continue to strive to talk to people, and to individual State commissions. We have adopted some joint procedures where we can consult in individual cases, and we are very open to working with them.

Mr. SYNAR. Ms. Moler, would you generally conclude that the GAO report was a pretty fair picture of the situation?

Ms. MOLER. Yes.

Mr. SYNAR. OK. Now, GAO recommended that you use your authority under the Administrative Dispute Resolution Act to encourage more voluntary settlements.

What plans and timetables do you have to implement this act?

Ms. MOLER. Before the new Commission arrived, the prior Commission had considered an ADR rulemaking. I supported the order that was before the Commission at that time.

Mr. SYNAR. Did you support that for electricity alone or across the board in all FERC programs?

Ms. MOLER. Across the board.

Mr. SYNAR. Is that the way you want to apply this one?

Ms. MOLER. Yes. However, we could not achieve agreement with the old Commission. We now have a new Commission. It is a new day, and we made a conscious decision this summer to—we have only had four meetings with the new Commission. We have chosen to take up the Energy Policy Act issues first because they clearly were a priority, and we will turn to ADR this fall.

Mr. SYNAR. Are you going to—staff is asking a good question. Are you going to start over? Are you going to ditch the old effort or where are you going to go on this?

Ms. MOLER. Well, we always have the draft in the computer that we started with.

Mr. SYNAR. Now with respect to EPACT that you just mentioned. While I have got you under oath: Do you need more people?

Ms. MOLER. Not now, no, sir.

Mr. SYNAR. I am going to hold you to that.

Ms. MOLER. I said "now," sir.

Mr. SYNAR. You learned from Martin, didn't you?

Now, I understand from one of your attachments that this issue of jurisdiction between FERC and the States and between FERC and the SEC that FERC supports the Bumpers' bill that would restore the jurisdiction that you lost in the OPCO case.

Do you believe that the split jurisdiction with the SEC that we have been talking about here with some of the other panels impedes your ability to effectively regulate?

Ms. MOLER. Absolutely. I would disagree with Commissioner Russell in the sense that we can resolve this administratively. We lost before the Supreme Court. Since then, we have taken actions consistent with that loss and dismissed a number of cases or decided them consistent with that decision. We can no longer look at certain rate issues at all where there are public utility holding company structures that have been approved by the SEC. I don't believe that that is appropriate. They do not hold hearings on rate cases.

As I told the Senate committee that was considering the legislation, that is one area where I believe we have the expertise to do a better job than they do, and I would support the legislation.

Mr. SYNAR. So you are supporting the legislative effort?

Ms. MOLER. With a couple of slight technical amendments, yes, sir.

Mr. SYNAR. OK. Now many States are hosting competitions to provide for new wholesale power supply. What happens if a wholesale competitor wins a State competition but you prohibit the sale under your own rules?

Ms. MOLER. I don't believe that is a frequent occurrence.

Mr. SYNAR. How do you minimize that conflict?

Ms. MOLER. There have been a couple of cases where the wholesale rate, where those winning a competition have come to us for rate approval, and we have disapproved the rate initially as a market-based rate.

I dissented, I might add, from a couple of those decisions, notably a case involving an independent power producer in Nevada called Nevada Sun-Peak because I thought that the State had met its protection—had protected its ratepayers well. We later determined in that case, the rates they sought could be justified as cost-based rates, but we are, of course, required under the Power Act to look at rates and make sure they are just and reasonable and not unduly discriminatory or preferential.

In some instances we have found that the competition has not been very robust, there have been only one or two bidders, perhaps an affiliate, and we have not approved those transactions, but by and large we have.

Mr. SYNAR. All right.

Now, how are we going to solve this regulatory gap between the regional IRPs and the holding companies? I am told that you all didn't support the Senate solution last year.

Ms. MOLER. I personally was not involved in that, and the Commission, as a Commission, did not take a position on that legislation. We seldom do. I believe right now the most realistic, viable, hopeful solution is development of regional transmission groups.

Mr. SYNAR. And you support giving self authority and IRP authority for that?

Ms. MOLER. If regional transmission groups are properly done, we will not need IRP authority. IRP is really a retail issue, and an issue for those who have the direct jurisdiction over the generators, but it is not so much a wholesale rate issue, and I don't believe that we need it.

There is, of course, the issue with the holding companies, and I believe that properly structured RTG's that are truly regional can work effectively in this area.

Mr. SYNAR. I have some quick questions here, Mr. O'Neil and Mr. McDiarmid endorsed giving notice to prefiling conferences and broadening their use. What is your position.

Ms. MOLER. I want to encourage as wide a discussion as possible within the limits of the Administrative Procedure Act with people who are affected by what we do, whether they are IOU's, whether they are people who are potentially filing complaints or whatever. Obviously, once a case is filed and it is protested, we no longer can participate in such conferences.

Mr. SYNAR. You heard both sides of the argument. Which side did you like?

Ms. MOLER. It is not that simple.

Mr. SYNAR. Which one sounded better to you?

Ms. MOLER. Wide open discussion with as many as we can.

Mr. SYNAR. Which one sounded better, Sholander or McDiarmid, which one did you like?

Ms. MOLER. I don't agree precisely with either one of them.

Mr. SYNAR. All right. Mr. Sholander strongly endorsed using a market screen approach. Do you agree?

Ms. MOLER. I am not sure what you mean by the market screen.

Mr. SYNAR. I am referring to the use of a market screen approach to define antitrust problems, Mr. Sholander recommended using the market screen.

Ms. MOLER. There has been a rather lively debate on whether,, when we grant market-based rates, we are using a proper analytical tool. I don't believe that the market screen that we use has been shown to be illegal or inappropriate, and we intend to continue to use it.

Mr. SYNAR. All right, last question for this round. Can I get a commitment by you under oath that we are never going to see another Quad 7?

Ms. MOLER. Yes.

Mr. SYNAR. OK. How do we do that? How do we avoid that in the future?

Ms. MOLER. In that case, it was a lot like the Hatfields and the McCoys. I don't know how you avoid the Hatfields and McCoys. Certainly there were some inexcusable administrative lapses at the Commission. A judge died during the case. You can't do a lot about that, but we certainly want to——

Mr. SYNAR. All kidding aside, periodic review of where the cases are and how old some of them are and how stale they are, that at a minimum we have to do, right?

Ms. MOLER. One of the things I have learned since becoming Chair of the Commission is how limited my authority is over our

administrative law judges. We cannot even require them to give us lists of pending ancient decisions. It is——

Mr. SYNAR. Why is that?

Ms. MOLER. That is because the independence, appropriately so, of the administrative law judges is very carefully guarded. They do not want to be subject to whims.

Mr. SYNAR. We know what the status of a Federal case is or the cases in Federal court, why wouldn't we know that for an ALJ?

Ms. MOLER. There are provisions in the statute that govern ALJ's that prohibit——

Mr. SYNAR. Do you want us to fix that?

Ms. MOLER. Congress is currently looking at—I think it is called—there is pending legislation for the administrative law judge corps. Our chief administrative law judge has advocated—I can't speak for him, but he is on record as supporting changes in reporting requirements and the like. It is a fine line, though, where you have political people appointed to these positions, and you have people who are judges who are handling these cases.

Mr. SYNAR. Get back with me on it. I am on Judiciary. Let's see if we can fix that. That is ridiculous if you don't even know. Disclosure of lateness, and the delay itself, moves the process forward.

You can put a lot of heat on it. I wasn't familiar with that. Why don't you and I get together on that? That is interesting.

Mr. Hastert.

Mr. HASTERT. Thank you, Mr. Chairman.

I certainly welcome you to this hearing on oversight. You have a big job ahead of you, and this question I guess you may think is a softball question, but it is not. With the new law coming into place, FERC certainly has increased responsibilities especially with the play of this conscious decision by the Congress to move toward a new area of regulation or nonregulation in electrical transmission generating. That law really had some far-reaching effects. I want to know what is your role? What is your vision for where you want to take the issues that FERC looks at today into the next decade?

Ms. MOLER. The appropriate role for the Commission is to encourage a competitive bulk power wholesale market. One of the ways that we can encourage that to happen, of course, is by ensuring that willing buyers and willing sellers get together, and that if there is capacity available between the two, it is available to those to transmit the power. That is to me the essence of what the Energy Policy Act has—the Energy Policy Act's vision, not our vision.

Mr. HASTERT. So in a sense you become an honest broker?

Ms. MOLER. We become a policeman. We also, of course, want to encourage those types of transactions to take place. I don't believe that electric generation is any more a monopoly market, for example. Clearly transmission is. We have to price it appropriately, and we have to make sure that it is available on not unduly discriminatory terms.

Mr. HASTERT. I don't think that is any different. Again, I guess I show my prejudice here, but look at our free enterprise system and our manufacturing marketing system. Individuals own the facilities to manufacture, but yet the public owns the highways to deliver the goods. Only when there is conflict about who can use the

highways and who can't use the highways do the courts really get involved.

Do you see that role for FERC?

Ms. MOLER. Not really, because we have told them on our "highways," they are rate regulated. And certainly we have to deal with access and congestion, to follow the analogy. But I view it as, we want to encourage the transactions, efficient transactions to take place.

Mr. HASTERT. The chairman talked about some of the administrative problems especially dealing with administrative law judges and making sure the process moves forward. Ultimately you take responsibility, but sometimes those things tend to be out of your hands.

I am happy to see that the chairman wants to take a look at that issue. I understand that there is a very intricate balance. We tried to put together a new public utility act in Illinois, and I was at the center of doing that.

The whole issue of ex parte comes up. How do you move these things through, keep Commissioners well informed, and keep staff that can really separate that information?

Is that a problem? Do you see it as an administrative problem? I am looking for a candid response on that.

Ms. MOLER. Before I went to the Commission 5 years ago, I worked for the Congress for 20 years. I was stunned to find the difference in my information. As Mr. McDiarmid observed earlier, it is very frustrating. How you separate policy issues, and we are still policymakers, from your adjudicatory role, is very difficult. Particularly, for example, take transmission pricing. We are doing this big picture look at transmission pricing, but we still have individual transmission pricing cases. Can you talk to people about transmission pricing, or has that become a subtle attempt to influence a pending case? I don't think we have satisfactorily dealt with that yet.

Mr. HASTERT. That is part of the vision I started to talk about earlier. Where are you moving, and how do you see the Commission being effective and being able to handle the new challenges?

I would guess that just as State commissions can exchange ideas, there is a lot of exchange of information. That has to happen before good, intelligent decisionmaking and policymaking can take place.

I would like to see you start thinking about the future. What do you have to do to do a better job? What are the differences you have to make inside to do a better job?

Maybe it will take legislation to do it, maybe it won't. But I think one of the best things you can do for us is to take an analysis of where you are and what the challenges are in the future and say, "If we could change this or tweak that, I could be a more effective chairman and we could be a more effective commission." I think that would serve us all well. I ask that you start thinking about that and give us some feedback.

Ms. MOLER. I will take that to heart. Right now I wouldn't say we are overwhelmed but we have plenty to do with implementing the new act.

Mr. HASTERT. It is like jumping into the deep end of the swimming pool. I understand that you have to get your head above water first. We would certainly extend that courtesy.

Thank you. I yield back, Mr. Chairman.

Mr. SYNAR. Ms. Pryce.

Ms. PRYCE. Thank you, Mr. Chairman.

Welcome, Madam Chairman. It is wonderful and refreshing to see your approach, to hear the compliments you are already getting, to know you are effectiveness minded, that you are really going in that direction.

Having said all that, I have to say that there are some people in my State of Ohio that feel that in some instances perhaps you are going a little too fast. I feel it is incumbent upon me to ask some questions in that regard.

As you know, there is a merger in front of FERC, and that merger is between the Cincinnati Gas and Electric Co. and the Public Service Co. of Indiana. Apparently that was filed back in December and then dismissed, and then amended again to reflect the holding company situation in the middle of July.

A number, I believe 18 or 20, parties from Ohio have filed with FERC requests for a hearing. And that is the nature of my question. Will they be afforded a hearing, and what are the parameters of why and when you afford interested parties hearings in measures of this——

Ms. MOLER. We have to be careful here because it is, of course, a highly contested case. As a matter of general policy, the Commission has hearings only when there are disputed—it is also a matter of law, not just general policy—when there are disputed issues of material facts that require a full adjudicatory hearing before an administrative law judge.

We have set a number of prior mergers for hearing. Indeed, we currently have one merger in hearing, and that involves Entergy and Gulf States, which are Louisiana and Texas and Arkansas utilities combining.

We have not acted on the pending PSI Cincinnati Gas and Electric-CINergy case.

We have followed the State proceedings closely. We have requested comments from all sides on the recent amendment to their filing—indeed, we sought out information from the parties when the Indiana commission said that the proposal was not consistent with Indiana's statute. And we asked them what they intended to do.

They filed an amendment to their pending merger proposal. We sought comments on that amendment. And the comment deadline—the latest in a series of opportunities for comments—expired Monday of this week. We have been very careful, I believe, to handle the case correctly procedurally thus far, and as I said at the last meeting, we intend to act on the case by the middle of the month.

Frankly, that is about as far as I can go right now.

Ms. PRYCE. I guess—and I don't come down on either side of this by any means. I don't even know the implications or the legal ramifications. All I am concerned with is that it is handled fairly and

there is an opportunity for all sides to have whatever input they desire to have. And I am sure that that is your desire as well.

But the complaint that I have been hearing is that the timeframe is much too short with this new corporate structure that is proposed, and I would like your remarks on that.

Ms. MOLER. We have sought public comment on the proposals that have been before us at every stage of the process. It is a fine line, when does due process become undue process. And the merger proposal has, of course, been pending with the Commission since last December.

I don't think that we have been in a rush to judgment on that proposal. The prior Commission was in a position to decide the case. However, we were down to three Commissioners, and I was at that time the Chair of the Commission, and I very purposefully delayed a decision until the new Commission was there, because I felt it should be a decision that is made by the full, duly constituted, Commission and not by a couple of lame ducks. We are now in a position to act on it after nearly 9 months of proceedings before the Commission. And I believe we will do so next week.

Ms. PRYCE. And is that—even after having considered the fact that a holding company corporate structure is different than the initial filing?

Ms. MOLER. Yes.

Ms. PRYCE. Is this in your opinion allowing all parties to have had adequate discovery time with this new corporate structure in place?

Ms. MOLER. There are various means we have of affording parties an opportunity to comment. Discovery in the traditional legal sense is something that happens only when you are before an administrative law judge at the Commission. We don't have cross-examination and so on and so forth at the full Commission level. Our administrative law judges handle that for us.

We have paper hearings before the Commission where there are not disputed issues of material facts that we have to deal with. And we have gone through that process since December.

Ms. PRYCE. The fact that the State of Ohio and the Office of Ohio Consumers Council and the cities of Cincinnati and Cleveland and 20 entities have requested a hearing, you don't think it is good public policy or practice to at least afford these folks an opportunity to be heard?

Ms. MOLER. I am trying to be very careful not to comment on the matters of their pleadings. I do believe that it is certainly appropriate to listen to them.

I have read their pleadings. I know my colleagues certainly have access to those pleadings. I can't tell you which one of them each of them has read. But I really would prefer not to get into the specifics of their request for a hearing before an administrative law judge. That is really a merits determination that is really not something that we should get into at this point.

Ms. PRYCE. All right. And so basically your answer is that there is no issue of law as determined by——

Mr. SYNAR. Ms. Pryce, let me interrupt. I have been very generous in allowing you this line of questioning.

Ms. PRYCE. I appreciate it, Mr. Chairman.

Mr. SYNAR. I think Ms. Moler has sufficiently answered the question within the parameters she is allowed to without potentially violating her independence and objectivity. I think it would be improper if this branch of government went any farther at this moment.

Ms. PRYCE. I am not trying to get her to comment on the merits. I am just trying to get her to see that in my opinion, this Member's opinion, public policy would dictate a more open process at this turn of events. I will leave it with that.

Thank you, Mr. Chairman.

Mr. SYNAR. Thank you.

One final question from myself. Mr. Sholander's testimony, Ms. Moler, highlighted some of the difficulties with the requirements of the mandatory purchase of the QF power at avoided cost rate under PURPA. And I am interested in that because, since QF's, Oklahoma saw about 15 percent increase, and that was not something they enjoyed.

Are there possible FERC remedies for these high QF electricity rates, and should there be a definition of cogeneration, and if not, are you supporting legislation to be directed?

Ms. MOLER. Prior to joining the Commission, to my joining the Commission, the Commission had proposed a series of four notices of proposed rulemaking for electric matters. One of them was referred to earlier today. It is known as the ADFAC. In that proposal the Commission was proposing to override New York State's determination of what was an appropriate avoided cost.

The essence of PURPA, as I view it, was Congress' determination that QF's would be entitled to interconnections with utilities and entitled to a market at an appropriate avoided cost.

But the determination of what is an appropriate avoided cost was not given to the Federal Energy Regulatory Commission. It was left up to the individual State commissions and/or appropriate State bodies.

There have been a number of States that have not had controversial avoided cost issues. Some of them frankly did a better job than others. But some of them chose to encourage QF's, and in the case of New York the legislature chose to impose a requirement that they pay a cost, a price that exceeded the avoided cost.

The legislature since then has repealed that provision of law. They were very careful to grandfather existing transactions in doing that. And the utilities and the QF community are working their way through the legacy of that law.

Mr. SYNAR. Is there anything you can do?

Ms. MOLER. We could do something. Whether we should do something is an open question, or whether we should just say that the States experimented here and some of them did a better job than others.

Mr. SYNAR. What do you think?

Ms. MOLER. As a generic matter I believe Congress decided to leave these determinations to State regulatory commissions. And I would respect that.

Mr. SYNAR. You are not going to get engaged in this, then?

Ms. MOLER. I don't really want to be in the business of overriding State public utility commission or State legislatures——

Mr. SYNAR. So legislation is needed, if we are going to tighten up——

Ms. MOLER. If you choose to do that, certainly that is your prerogative.

Mr. SYNAR. Mr. Hastert.

Mr. HASTERT. Just to follow up on that, with the passing of EPACT last year, all of a sudden QF's and IPP's and cogenerators, all under PURPA, are selling electricity back to utilities that avoided cost. It used to be a local thing. But when you start to open transmission lines and the whole movement of electricity becomes not just a State issue but also a regional and national issue, all of a sudden it goes past State lines. What one State does certainly impacts a practice in another State. Selling back excess capacity and the avoided cost issue drives what advantages a State realizes from one to another.

If you are going to look at electricity on a regional basis, maybe you need a better perspective or a national view of this instead of just a State-by-State view. It is no longer, at least in my opinion, just a State-by-State business.

But the Idaho State Commission affects what the Wyoming State Commission does. They may get all these things worked out, I don't know.

Ms. MOLER. Not yet.

Mr. HASTERT. It may be under your purview, because it is more than just a State issue.

Ms. MOLER. I think that certainly States have learned from this experience. I agree that there were some State experiments, State laboratories where the experiments failed with QF's. The initial California standard offer, for example, was a very expensive proposition for the ratepayers in California under PURPA.

There is no doubt that the New York 6 cent law was an expensive experiment for the ratepayers in New York. But that is what the legislature did.

Mr. HASTERT. As a matter of fact, with the PURPA law, I will tell you about what the unintended circumstances were in Illinois. Our utility rates were very, very high, as a matter of fact. Big commercial enterprises that could find cogeneration alternatives did. The PURPA issue there was to let that fall back, and let excess capacity move back in.

So cost and markets also drive those issues. And I had some disagreement with EPACT, but the law is the law, and what we want to do is make that industry as fluid as possible. You may need to review that.

I thank you. I yield back my time.

Mr. SYNAR. Ms. Pryce, any further questions?

Ms. PRYCE. If the chairman will allow me to pursue my prior line of questioning, I have a couple.

Mr. SYNAR. Ms. Pryce, I wasn't trying to pick on you, but we have got to be careful. We don't want to jeopardize those fine communities in Ohio and all the various people who have been doing that. I don't think that you would want to prejudice them.

Ms. PRYCE. Absolutely not.

Mr. SYNAR. That is what I am trying to make sure that we don't do, because you being a freshman, these hearings take on a life of

their own, and I am sure you have generated enough meter time this afternoon in Ohio to make a lot of people rich in this community. So I just want to be careful what we do here.

Mr. HASTERT. Let me interject. I want to reserve the rights of our member from Ohio. Coming off the bench, I think she is real sensitive to a lot of these issues.

Mr. SYNAR. That is why I gave her as much leeway as I did.

Mr. HASTERT. I would like her to be able to pursue her line of questioning.

Ms. PRYCE. Let me just ask some generic questions, if I might, Mr. Chairman, and be unspecific, if I could.

Mr. SYNAR. That would be fine.

Ms. PRYCE. Tell me about your notice provisions and how long you give parties to respond. Is that arbitrarily set by Commission members, or is there a timetable that you use in your rules, or——

Ms. MOLER. We have some fairly standard practices. But they are, of course, all affected by time limits imposed by the statute. For example, in rate cases, we have to take initial action on the rate filing within 60 days. So we have some standard practices where we get the filing, we look to see if it is complete. If it is, we put a notice in the Federal Register, give parties 15 days to let us know what they think about it, then there are reply comments provided for as well, all within the 60-day period.

In other cases where we do not have a statutory deadline for acting, we are much more generous when we can be. We have initial comment periods of, say, 30 days. We get reply comments. And parties—even though our rules prohibit it—frequently do reply to replies, and we get replies to replies to replies. Sometimes we have paper hearings on issues where they really don't require an administrative law judge determination of the credibility of a witness. For example, where you have these big economic issues, frequently they don't require that, and we do paper hearings, again, in an effort to beat the average number of days that these complex—excuse me, nonroutine—applications take.

It is a very difficult equation to solve, what is adequate time, where people whose economic interests are at stake, in a lot of instances, really may benefit from delay. It is difficult to solve.

Ms. PRYCE. I really do mean it when I say I commend you for your attempt to mop up the backlog and get things moving. A 7-day response period, though, in my opinion seems very short in complex matters. In my court, when we had very minor cases and much more menial routine things, I mean, our time periods were even much longer than that.

Seven days, do you think that is reasonable to have turnaround time for responses?

Ms. MOLER. If one is looking at a very, very, very broad issue, a huge rate case, for example, certainly 7 days is not adequate. If one is looking at a particular limited aspect of a case where the record has, and where the proceedings have been, open for a long period of time and parties are no doubt focused and certainly know what is going on here, I don't believe it is inappropriate.

Ms. PRYCE. Thank you, Mr. Chairman.

Mr. SYNAR. Let me thank you, Ms. Moler, for being with us.

Let me make a couple of concluding remarks here. For our new members on this subcommittee, this concludes what has been one of the most comprehensive, long overviews of an agency, particularly this one, that has ever been done. We began this process technically in October 1990. For those of you who have followed us through this path of investigation, one would be shocked by this particular hearing today. It didn't resemble the previous ones. That is not because I disliked Martin Allday.

The fact is that in the other three hearings or more that we had, we let the facts and the investigation run its course. It happens to be that this particular element of FERC is being run pretty well, that GAO in a very objective manner found that the shop is being run in a way that we can be very proud of.

The only regret I have of this hearing is that Martin is not here so I can compliment him, because I think over the years he has had this sense that I was picking on him and that I was out to get FERC or try to dismantle him because of either partisan reasons or because I didn't like FERC in general. That is not the case.

This subcommittee, of which I am very proud, is probably one of the two most active subcommittees on oversight in either the Senate or the House. We pursue these matters with sincerity, and we do not do what I call hit and miss types of hearings. This is an example, for those who are interested, of what we commit ourselves to, which is once we start an issue, we are going to stick with it until we complete it.

Our investigation is now over, and shortly, I hope that we will be able to release a small report that will outline what we found, so that Members and also FERC will have an opportunity to review.

We look forward to working with the new chairman and the new Commission. I think you have one of the toughest jobs not only in government but maybe in the country with respect to trying to implement very difficult programs which have highly competing interests, both economically as well as politically.

We will continue to work with you and criticize you when we think necessary. We want to thank the Members for coming today, particularly Republicans. I am excited that Dennis was able to draw a crowd like this. I think this is an indication, and a tribute to you, Ms. Moler, of the importance that this subcommittee places on your agency.

[Whereupon, at 1 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

United States General Accounting Office

GAO

Report to the Chairman, Environment, Energy, and Natural Resources Subcommittee, Committee on Government Operations, House of Representatives

July 1993

ELECTRICITY REGULATION

Factors Affecting the Processing of Electric Power Applications

GAO/RCED-93-168

GAO

United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-253405

July 23, 1993

The Honorable Mike Synar
Chairman, Environment, Energy, and
Natural Resources Subcommittee
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

This report responds to your request that we review the Federal Energy Regulatory Commission's (FERC) processing of applications for the approval of proposed wholesale electricity transactions. FERC is responsible for regulating the rates, terms, and conditions of these transactions—a growing portion of the nation's electricity business—as well as certain mergers and other transactions between utility companies. The Energy Policy Act of 1992 provided for changes in the electric utility industry that are likely to increase the number of wholesale transactions and expanded FERC's authority to regulate the transmission of electric energy.

Specifically, we identified (1) factors affecting the time that FERC takes to process electric power applications; (2) the potential effects of the 1992 act on FERC's work load, particularly the Commission's new authority to order utility companies to allow other electricity sellers to use the companies' transmission lines; and (3) potential procedural changes that could reduce the time needed to decide on applications.

Results in Brief

The processing time for electric power applications depends primarily on the applications' characteristics, which determine the procedures FERC follows. About 80 percent of the 4,475 applications FERC processed during fiscal years 1990-92 were "routine": They did not raise factual, legal, or policy issues and were not contested by customers, other affected parties, or FERC staff.[1] These applications were decided on by the staff in FERC's Office of Electric Power Regulation (OEPR) within an average of 68 days from receipt. In contrast, the 919 nonroutine applications required a review and decision by the five FERC commissioners, who decided on 747 applications without a trial-type hearing in an average of 169 days. The remaining 172 nonroutine applications were scheduled for a trial-type

[1]FERC does not track applications but "dockets," generally defined as items before the Commission that require a decision. Depending on the issues raised in an application, FERC may create more than one docket.

hearing for resolution; while more than half were settled voluntarily, it took an average of roughly 2 years to decide on these applications.

The Energy Policy Act of 1992 is likely to increase the number of wholesale electricity sellers and transactions requiring FERC approval. Most importantly, because the act expanded FERC's authority to order utility companies to provide electricity transmission services, FERC is likely to begin receiving applications for such orders. Because its authority to issue such orders prior to the act was limited, FERC has little experience in this area. The effect of transmission applications on FERC's work load is difficult to determine. It depends in part on the volume and complexity of the applications and the extent to which parties reach voluntary agreements before submitting the applications to FERC.

Although FERC has taken actions to reduce the time needed for processing applications, our analysis suggests that further reductions are possible by (1) revising its method for tracking applications in its management information system to identify potential bottlenecks, (2) improving the accuracy of the applications received by analyzing the number of and reasons for incomplete applications, and (3) increasing the use of voluntary settlement procedures by adopting a policy as required by a 1990 law designed to encourage alternatives to lengthy trial-type hearings.

Background

Under the Federal Power Act as amended, FERC—an independent regulatory commission within the Department of Energy—is responsible for ensuring that the rates (prices), terms, and conditions of wholesale electricity transactions are "just and reasonable" and nondiscriminatory. In addition, owners and operators of jurisdictional facilities are required to obtain FERC approval before selling, merging, consolidating, or otherwise disposing of those facilities.[2] Utilities or nonutility generators that wish to carry out these transactions must submit an application to FERC.

FERC consists of five appointed commissioners and associated staff. The commissioners generally hold a public meeting twice a month to decide on applications. They complete action on applications at these meetings by issuing "orders." Pursuant to the Federal Power Act and the Administrative Procedure Act, FERC must follow certain procedural rules in deciding on proposed electric power transactions; these include filing a public notice of the transactions and allowing affected parties—such as

[2]With some exceptions, facilities subject to FERC jurisdiction are those used to sell or transmit wholesale electricity.

utility customers, competitors, state utility commission officials, or others—to comment. (Applications that result in one or more affected parties' intervening to protest are referred to as contested applications.) In general, FERC must develop a "public record" demonstrating the rationale underlying its decisions, which can be appealed in federal courts.

About half of the electric power applications FERC decided on during fiscal years 1990-92 were to establish or modify agreements for the sale or transmission of wholesale electricity (rate-change applications). Historically, FERC approved proposed wholesale electricity sales largely after ensuring that the proposed rates properly reflected the seller's costs, including a predetermined estimated rate of return; such rates are called cost-based rates. In the 1980s, FERC began approving certain wholesale transactions if it found that they resulted from an operating free market; that is, they were the outcome of competitive market forces among buyers and sellers. Rates determined in this manner are called market-based rates. Market-based rates provide sellers with an opportunity to earn a greater rate of return than do rates determined by cost-based regulation.

Time Required to Process Applications Depends on Their Characteristics

The time taken to process an application depends largely on the application's characteristics. Routine applications are reviewed and decided on in OEPR. In contrast, nonroutine applications require action by the five FERC commissioners and take significantly more time to decide on.

Most Applications Are Routine and Are Processed Relatively Quickly

OEPR staff initially review all applications and determine which review procedure to follow. Those that do not raise factual, legal, or policy issues and are not contested by affected parties—routine applications—are decided on by the Director, OEPR, under authority delegated by the commissioners (delegated authority). Roughly 80 percent of the applications completed during fiscal years 1990-92 were considered "routine" and were decided on by OEPR using delegated authority. The average processing time for these applications was 68 days. Roughly 70 percent of these applications were decided on within 60 days; another 23 percent were decided on within 6 months.

Nonroutine Applications Can Take Months or Even Years to Process

The remaining 20 percent were nonroutine applications that raised factual, legal, or policy issues or were contested. The range of issues included new policy areas (for example, market-based rates) as well as numerous

factors affecting the determination of cost-based wholesale rates. Nonroutine applications must be decided on by the commissioners; they cannot be completed through delegated authority.

The commissioners' review—assisted as necessary by staff in OEPR, the Office of Economic Policy, and/or the Office of General Counsel—requires an assessment of the issues raised by the application, the arguments raised by the applicant and affected parties, and the analysis and recommendations of FERC staff. Those nonroutine applications determined to have sufficient information can be decided on directly by the commissioners without the use of a trial-type hearing.

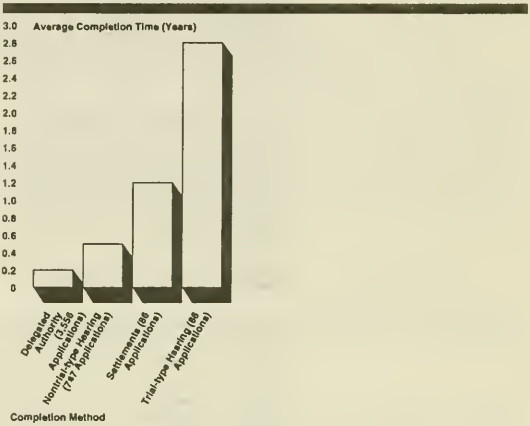
Nonroutine applications completed without the use of a trial-type hearing are often uncontested but raise legal or policy issues. Additional information is generally not needed in these cases because the issues are related to legal questions or Commission policy rather than disputes of factual information. Examples include market-based rate applications and applications seeking a determination of whether a certain utility activity is under FERC jurisdiction. Processing time for the 747 applications decided on in this manner during fiscal years 1990-92 averaged 169 days. More than 70 percent of these applications were decided on within 6 months; another 24 percent were decided on within 1 year.

Nonroutine applications that are contested by affected parties (intervenors) or that contain factual information questioned by FERC must also be decided on by the commissioners. Contested applications frequently involve factual disputes concerning a wholesale rate increase, in which the basis for the increase (the seller's costs) is disputed by customers. To settle factual disputes, the commissioners generally rely on a trial-type evidentiary hearing that allows cross-examination of witnesses before one of FERC's administrative law judges (ALJ). In such cases, the cross-examination helps to develop the factual evidence that will form the basis for the ALJ's decision, and, following a review by the commissioners, a FERC order. Although the commissioners may summarily affirm the ALJ's decision, a new opinion is written in most cases. Applicants and contesting parties may reach a voluntary settlement before the ALJ has issued a decision. Such settlement agreements, if approved by the commissioners, become the basis for FERC settlement orders.

As figure 1 shows, nonroutine applications, while fewer in number, consume a large share of FERC's time. Of the 919 nonroutine applications processed during fiscal years 1990-92, 172 (19 percent) were scheduled for

a trial-type hearing. Eighty-six of these cases proceeded through the entire hearing process, taking an average of 2.8 years to complete. The remaining 86 cases resulted in voluntary settlements between the applicants and affected parties; these took an average of 1.2 years to process.

Figure 1: Applications Processed, Fiscal Years 1990-92



Note The total number of applications completed was 4,475.

Source GAO analysis of FERC data

Statutory Changes Could Increase FERC's Work Load

The Energy Policy Act of 1992 amended two key statutes that regulate electric utilities: the Federal Power Act, as amended, and the Public Utility Holding Company Act of 1935, as amended, (PUHCA). These amendments, in conjunction with industry changes already under way, are likely to increase (1) applications requesting FERC orders for electricity transmission services and (2) applications for wholesale power transactions, especially those proposing market-based rates. However, the

magnitude of these increases and the change—if any—in FERC resources that will be required to respond are uncertain.

FERC Faces New Role in Electricity Transmission

Because electricity transactions require that the generating source (seller) and the utility (purchaser) be connected via electrical transmission and/or distribution systems, the potential for more transactions depends to some extent on the ability of wholesale sellers to arrange for the transmission of their electricity. In 1978, FERC was authorized to mandate the provision of transmission services; however, partly because such orders had to satisfy a number of rigorous criteria, FERC has virtually never used this authority. The 1992 act (1) expanded FERC's authority to issue mandatory orders by reducing the number of criteria that must be satisfied and (2) required FERC to acquire and make public information about utilities' transmission capacity and known constraints.

The effects of these amendments on FERC's overall work load are difficult to estimate and could be contradictory. For example, those seeking transmission services may be more likely to request a mandatory order simply because FERC has expanded authority to issue such orders. However, public information about available transmission capacity may provide a more effective position for those seeking transmission services to negotiate voluntary arrangements with owners of transmission facilities, thus precluding the need for a mandatory FERC order. Also, because of FERC's lack of experience in issuing such orders, owners of transmission facilities may be more willing to enter into voluntary arrangements to avoid uncertainty and the possibility of a FERC order with unfavorable rates, terms, or conditions.

Requests for mandatory orders or the approval of voluntary agreements could add to FERC's work load by requiring FERC to undertake complex analyses of transmission systems and the effects of various transmission options—information that it previously has not been required to routinely analyze. For example, assessing whether a mandatory order to provide transmission services would affect the reliability of service to the transmitting utility's customers might entail a relatively complex engineering study of alternative power flows. FERC officials responsible for electricity regulation stated that they have limited experience in deciding on the best use of transmission resources and that the effect of applications requesting mandatory orders on FERC's work load is difficult to determine. Specific effects depend on how many transmission applications FERC receives; whether they are contested; whether they raise

factual, legal, or policy issues that the Commission must decide; and whether parties can reach voluntary settlements before submitting applications to FERC.

Potential Exists for More Wholesale Transactions

Partly in response to economic and regulatory changes, wholesale electricity markets have grown significantly in recent years; electricity in wholesale transactions now accounts for more than half of the electricity sold to retail customers. As we reported in 1992, amendments to PUHCA are likely to further increase the number of wholesale suppliers in electricity markets and the proportion of electricity generated for wholesale consumption.[3]

The increase in wholesale suppliers and expanded access to transmission facilities may create or augment wholesale electricity markets. Because of the opportunity to earn greater returns, wholesale suppliers may be more likely to propose market-based, rather than cost-based, rates. Market-based rate applications require FERC to analyze aspects of the process used to develop proposed rates, terms, and conditions, such as the seller's and buyer's relative influence in determining the "market" price. This analysis differs significantly from that for traditional cost-based rate applications, which require FERC to review detailed utility cost information used to justify the proposed rates, terms, and conditions.

Since 1984, FERC has processed roughly 50 market-based rate applications. Most of these applications were decided on by the commissioners as nonroutine applications without the use of a trial-type hearing, while the remainder were processed as routine applications and were decided on by OEPR under its delegated authority. According to FERC officials, the number of issues that can be contested in market-based rate applications are substantially fewer than in cost-based rate applications; as a result, market-based rate applications are less likely than cost-based rate applications to require a trial-type hearing.

Actions Could Reduce Average Processing Time

Over the years, FERC has taken a number of actions to improve the processing of electric power applications, including (1) establishing and expanding the circumstances under which FERC staff can use delegated authority to decide on applications, thereby freeing commissioners for nonroutine cases; (2) revising Commission procedures to expedite the

[3]Electricity Supply: Potential Effects of Amending the Public Utility Holding Company Act (GAO/RCED-92-52, Jan. 7, 1992).

consideration of voluntary settlements; (3) adopting procedures for ALJs to conduct settlement negotiations; and (4) adopting procedures for expediting litigated applications. Some evidence suggests that FERC has been successful in streamlining the processing of electric power applications. For example, our 1980 report on FERC's application review process found that, as of April 1979, FERC had roughly 60 electric rate applications that had been pending for more than 4 years.[4] As of September 1992, FERC had only seven cases that had been pending for that long.

Our discussions with FERC and industry officials, as well as our recent report on FERC's gas pipeline activities,[5] suggest that cost-effective opportunities exist to further reduce the time needed to process electric power applications. These include (1) revising how applications are tracked in FERC's management information system to identify potential bottlenecks, (2) improving the accuracy of applications to reduce the number submitted that lack certain information, and (3) increasing the use of voluntary settlement procedures to reduce the number of cases that are decided on through a trial-type hearing.

Improving FERC's Management Information System

We reported in February 1992 that FERC's management information system—the Key Indicator Case Tracking System (KICTS)—did not enable FERC to effectively evaluate its application review process for natural gas pipelines. Specifically, KICTS did not retain the original target dates for key phases in the review process. Retaining these dates would have allowed FERC to assess its performance in meeting target dates and to identify areas needing improvement. FERC officials agreed with our assessment and altered KICTS to retain these dates for gas pipeline cases.

Similarly, KICTS files used to assess electric power applications could benefit from upgrades to capture certain dates. Under its current design, KICTS does not consistently retain beginning and ending dates for applications' movement through the various stages of FERC's review process. Such information would allow FERC to assess its performance in processing applications and to identify bottlenecks in the review process. KICTS also does not capture the number of incomplete applications FERC receives or the dates showing how long it takes applicants who file

[4]Additional Management Improvements Are Needed to Speed Case Processing at the Federal Energy Regulatory Commission (GAO/EMD-80-54, July 15, 1980).

[5]Natural Gas: Factors Affecting Approval Times for Construction of Natural Gas Pipelines (GAO/RCED-92-100, Feb. 26, 1992).

incomplete applications to provide missing information. Improving KICTS to capture this information would allow FERC to use KICTS as a management tool for identifying the volume of incomplete applications and the additional time spent processing them—first steps in reducing the incidence of incomplete applications.

In addition, because KICTS does not consistently retain certain dates and other information FERC uses to assess its performance, FERC staff must rely on personal computers in conjunction with KICTS-generated information to develop management reports. Staff efforts to assemble these reports result in a duplication of work using both computer and staff resources; a reconfiguration of KICTS could produce this information.

Improving the Accuracy of Applications

FERC has written requirements for filing applications that are part of the Code of Federal Regulations. However, FERC's decisions in individual cases can affect these requirements by establishing Commission precedent that must generally be followed by later applicants. FERC also maintains an "electronic bulletin board" that provides access to the texts of formal documents issued by the Commission.

FERC staff responsible for processing electric power applications estimated that 30 percent of all rate-change applications fail to satisfy FERC's application filing requirements. This is the same percentage of incomplete electric power rate applications that we reported in our 1980 report. FERC staff identified several reasons that may explain the volume of incomplete applications. First, compared with state-regulated retail sales, wholesale power is a smaller portion of most utilities' business, and applicants file applications with FERC on a much less frequent basis. Also, not all applicants stay abreast of changes in filing requirements that result from FERC orders in individual cases.

To minimize processing time, FERC staff often telephone applicants if information is missing from an uncontested application. FERC staff estimate that they place roughly 250 calls annually. For contested applications, the staff issue formal letters (referred to as deficiency letters) requesting the needed information. These letters are infrequent, averaging about 40 per year during fiscal years 1990-92. Applicants also have the option of telephoning FERC staff to discuss filing requirements prior to submitting an application. FERC staff estimate that they receive about 200 such calls annually. However, issues raised and information communicated in telephone calls are not retained and analyzed.

By formally tracking the number of and reasons for incomplete applications, and by periodically assessing the issues raised through letters and telephone calls, FERC could identify problem areas that could be addressed through amendments to filing requirements or a policy statement to reduce the number of incomplete applications. Identifying and resolving problems is essential because industry changes and the Energy Policy Act are likely to lead to increased numbers of nontraditional applications (for example, market-based rate applications or transmission applications) that will probably demand more staff time, leaving less time for routine applications.

Increasing the Use of Voluntary Settlement Procedures

Our analysis of applications completed during fiscal years 1990-92 clearly indicates that those requiring a trial-type hearing take significantly more time and that processing time can be reduced if the parties settle voluntarily. FERC has had some success in encouraging parties to reach voluntary settlements: Roughly half of the applications scheduled for a trial-type hearing are settled voluntarily. However, FERC has yet to implement a 1990 law designed to promote alternatives to trial-type hearings at federal agencies. Implementing the law could help increase the number of applications resolved through voluntary settlements.

The Administrative Dispute Resolution Act, enacted in November 1990, authorized federal agencies to use measures other than trial-type hearings, including arbitration and mediation, to resolve cases until October 1, 1995. The act requires almost all government authorities, including FERC, to adopt a policy addressing the use of alternative settlement procedures but does not mandate a date by which such a policy must be adopted. FERC has not yet adopted a policy pursuant to the act. According to a FERC official, the commissioners have not been able to reach agreement on the use of alternative processes to resolve disputes. In response to questions raised during March 1993 testimony before the Subcommittee on Energy and Power, House Committee on Energy and Commerce, FERC's Chair stated that FERC is evaluating the best way to integrate alternative dispute resolution techniques into its decision-making processes and that FERC is likely to consider a proposal prior to the end of July 1993.

The extent to which alternative procedures would affect processing time depends on the number of cases scheduled for a trial-type hearing for which these techniques could be used successfully. A FERC ALJ noted that similar alternative settlement procedures could also be used to reach voluntary settlements on issues prior to an applicant's submitting an

application to FERC, thereby decreasing the likelihood of a contested application requiring a trial-type hearing.

Conclusions

While FERC has taken action to decrease the time required for processing electric power applications, opportunities exist for further improvements. These opportunities are especially important considering the potential increased work load stemming from the Energy Policy Act. FERC's management information system could be upgraded to provide FERC managers with more specific information that could help identify problem areas and assess performance. Examining the information exchanged by applicants and FERC staff at the initial filing stage could help FERC to determine if changes to filing requirements or policy statements could reduce the number of incomplete applications. Alternative dispute resolution techniques could reduce the need for time-consuming trial-type hearings. In addition, similar techniques could enable applicants to settle disputed issues prior to submitting applications to FERC.

Recommendations

To further improve FERC's processing of electric power applications, we recommend that the Chair of FERC

- upgrade FERC's management information system to retain (1) data reflecting starting and completion dates of when applications moved through the stages of the application review process and (2) data indicating the number of incomplete applications and the length of time needed for applicants to supply missing information;
- systematically gather data on incomplete applications, through deficiency letters and telephone calls regarding filing requirements, and periodically assess this information to determine if revisions to FERC's filing requirements, policy statements, or other strategies could be used to eliminate or reduce the number of recurring problems; and
- expedite the adoption of a policy, as required by the Administrative Dispute Resolution Act, allowing for the use of additional alternative settlement procedures.

Agency Comments

As requested, we did not obtain written comments on this report, but we discussed its contents with the Director and Assistant Director, OEPR, and the Associate General Counsel for Hydroelectric and Electric, Office of General Counsel, who generally agreed with the facts presented. Their comments have been incorporated where appropriate.

To respond to your request, we examined existing reports and studies on FERC's activities and work load. We interviewed and obtained documents from officials in OEPR and other FERC offices. We obtained and analyzed data on the applications FERC decided on for fiscal years 1990, 1991, and 1992. We considered those dockets decided on rather than those received because dockets created in one year may not be decided on until a following year. We also interviewed one current and one former FERC ALJ, a former FERC commissioner, and several attorneys who currently practice before the Commission. We conducted our review between April 1992 and May 1993 in accordance with generally accepted government auditing standards. Our methodology is detailed in app. V.

Unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies of this report to congressional energy committees; the Chair, FERC; and other interested parties. We will also make copies available to others on request.

This work was performed under the direction of Victor S. Rezendes, Director, Energy and Science Issues, who may be reached at (202) 512-3841 if you or your staff have any questions. Major contributors to this report are listed in appendix VI.

Sincerely yours,

J. Dexter Peach
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The Honorable Mike Synar, Chairman
Subcommittee on Environment,
Energy and Natural Resources
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Synar:

Per your request, I am submitting the following responses to the questions you posed following my testimony before your Subcommittee on August 6, 1993.

1. Because of the overlapping jurisdictions of the state and federal governments over electricity, it is inevitable that conflicts arise between FERC and your members. A recent paper by Ashley Brown, your predecessor at NARUC and a member of the Public Utilities Commission of Ohio, sums up at least one view from the states regarding this delicate relationship: "[T]he problem is one of fundamentally different regulatory focuses and missions, of jurisdictional boundaries that are not only unclear but which also were never explicitly designed to yield the level of predictability and coherence in policy now required, particularly in such areas as transmission, energy efficiency, and purchased power contracts."

Do you agree with this view that it may be difficult, if not impossible, for state and federal commissioners to agree on every major aspect of regulation?

I would concur with former Commissioner Brown's observations about the difficulty that arises in attempting to reconcile state and federal jurisdictional responsibilities in the regulation of electric utilities. The state regulatory interest in protecting retail electricity consumers is intertwined with the regulated utilities' obligation to serve customers in their franchised service areas. There is no analogous obligation at the federal level. The FERC's interest in protecting wholesale electricity customers is imbued with the

furtherance of interstate commerce. Both federal and state regulatory bodies are charged with protecting the public interest. To this end, there is a common goal that both state and federal regulators can strive for. I believe that the greater public good requires state regulators and the FERC to sit down and discuss ways to minimize jurisdictional conflicts.

In the area of transmission services for example, the NARUC has requested that a collaborative process be developed to allow FERC and the states to seek common ground on the most contentious issues. These issues involve many stakeholders and substantial dollars. The rights of utility ratepayers, shareholders, third party generators and transmission dependent utilities must all be respected during this process.

I am not suggesting that each and every issue involving tension between federal and state jurisdictions can be resolved collaboratively. However, many of them could be and a framework for conflict resolution that allows the FERC to acknowledge state commissions as peers in representing the public interest--rather than just another self-interested party--must be established. Such a process would go a long way toward assuring that greater competition in the wholesale power markets and increased transmission access will result in benefits to all electric utility ratepayers.

2. Mr. Brown goes on further to say that state and federal regulations exist for different reasons, with state regulators primarily concerned with protecting captive consumers from the power of monopolies and federal regulators overseeing wholesale markets where market power may or may not exist. Do you think that the passage of EPACT made states and FERC even more likely to hold conflicting positions since, under the Act, an ever greater percentage of electricity sales moved from being retail to wholesale transactions?

Although there are inherently different regulatory responsibilities at the state and federal regulatory levels, there exists a common goal of the PUCs and the FERC to protect the public interest. This should and must be the overriding concern of both agencies.

Passage of the Energy Policy Act certainly has increased the likelihood that more electric utility power transactions will take place at the wholesale level. But this will not remove these transactions from state commission review. As I stated in my testimony, state commissions have asserted their right to review the reasonableness of wholesale power purchases by electric utilities serving retail customers. Although this right has not been codified in federal law and is subject to further court challenge, it nevertheless is a regulatory tool that has withstood previous court challenges and does provide a means for state commissions to protect the interests of retail electric customers.

Another way of looking at the issue is that states are responsible for reviewing the buyer's decision to purchase a certain block of power (as compared to other alternatives), whereas the FERC reviews the reasonableness of the seller's price and the extent to which the seller has viable competitors in the marketplace. The more that purchased power is relied upon by utilities to serve retail

customers, the greater is the need for state/federal, as well as regional, cooperation and coordination in planning and siting plants and transmission lines.

3. Have you had any recent communications from the FERC membership about future meetings to coordinate state and federal regulatory missions?

At the NARUC summer meetings in July 1993, Commissioners Vicky Bailey and William Massey expressed an interest in a collaborative effort between NARUC and the FERC. In its Notice of Technical Conference and Request for Comments in the Transmission Pricing Docket (RM93-19-000), the FERC is seeking input from all interested parties. No special conference with NARUC has yet been scheduled. It remains to be seen whether the FERC will agree to a dialogue with NARUC on this critical issue.

4. In March, NARUC adopted a resolution calling on the Congress to enact legislation to clarify the jurisdictional boundary between FERC and the state commissions. In this resolution NARUC sets out a series of unresolved policy areas on which the state commissions would like Congress to act. The first of these was the right of state public utility commissions to review the reasonableness of wholesale purchases by electric utilities which serve retail customers. Do you view FERC review of reasonableness as comparable to what would be conducted at the state level in terms of consumer protection?

FERC review of reasonableness is not comparable to state reviews in terms of consumer protection because there is a fundamental difference in the focus of the reviews. As I mentioned at the end of my response to Question 2, the FERC is regulating the seller and the state regulates the buyer. The FERC sets wholesale prices either on the basis of the seller's cost or, if it finds that a viable market exists, on the basis of market prices. The state regulates the retail utility which must choose from among several options to acquire the power to meet its customer demand. Those options include building a plant itself (state sets the price for power in that instance); reducing or shifting its demand through special programs usually referred to as demand-side management (these program costs are subject to state jurisdiction); or purchasing power from another utility or private power producer at rates that are set by the FERC. The FERC has no way of reviewing other options that may be available to a utility to reduce costs to consumers.

FERC's responsibility to create efficient, competitive bulk power markets is not inconsistent with state responsibilities to ensure that the ultimate consumers pay just and reasonable rates. However, even a FERC which makes no mistakes and operates in an exemplary fashion at all times is not sufficient to ensure that retail customers pay a fair price for power. As wholesale power purchases become more and more relied upon by utilities to meet customer demand, a conscious and continuing effort to mesh federal and state jurisdictional responsibilities becomes necessary to ensure just and reasonable rates.

5. The second issue in the March resolution concerns providing jurisdiction to state commissions over intrastate wholesale power transactions by utilities serving retail customers. Doesn't this overturn a long history of federal case law which has found all wholesale transactions on the interstate grid to be FERC jurisdictional? Wouldn't this result in over 50 different rate setting commissions inhibiting the expansion of competitive bulk power transactions?

NARUC has argued that the states are the most appropriate level of government to regulate power purchases between utilities and non-utility generators, including exempt wholesale generators (EWGs) when the buyer and seller are both within the same state. Section 201(b) of the Federal Power Act (FPA) currently assigns the FERC jurisdiction over transmission and wholesale sales of electric energy. While Section 201 has the advantage of providing a bright-line jurisdictional test, it fails to reflect the respective state and federal interests in regulating transactions between utilities and EWGs. States should be permitted to regulate these transactions--certainly those which operate wholly within state boundaries--because they primarily affect ratepayers in the area where the utility is located.

It is true that returning to the states jurisdiction over intrastate wholesale sales would reverse certain federal case decisions. That case law emanates from the 1964 Colton[1] decision which interpreted that because all electrons related to a transaction would not necessarily stay within a single state, all wholesale sales must be defined as interstate commerce. No one disputes the FERC role in regulating interstate commerce. What is in dispute is the idea that FERC is the most appropriate forum for setting rates where all parties to a transaction are located within one state.

While FERC preeminence on wholesale rates may have been a tolerable way to proceed when wholesale sales comprised a relatively small portion of retail rates, the movement toward increased wholesale competition has resulted in a substantial shift in energy procurement practices. With a growing share of retail electric sales being provided from power purchased at wholesale, a redistribution of authority is clearly in the public interest.

Most generation has historically been owned by the utilities that used it, and, thus, it has been regulated by state utility regulatory commissions. Expanding state jurisdiction to include wholesale sales by EWGs--or redefining such sales as something other than wholesale--would allow states to retain primary jurisdiction over the generating sector of the utility industry, whether or not the generating plants are owned by utilities. This is appropriate because the great majority of the costs for power generation will ultimately be borne by retail ratepayers, regardless of whether their utility power supply comes from building their own generating capacity or purchasing it elsewhere.

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[1]See Federal Power Comm v Southern California Edison Co, 376 US 205; 84 S Ct 644; 11 L Ed 2d 638 (1964).

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A recent example in Michigan may help to illustrate the logic of this point. One Michigan utility proposed to sell a generating plant that has been in its ratebase for 17 years to a newly created entity, owned in large part by the same utility. The plan was to have this potential EWG sell 100 percent of its output back to its previous owner, who in turn would sell it to the same ratepayers who would have purchased it under the prior ownership structure. The utility was in Michigan, the EWG was to be in Michigan, the point of interconnection is in Michigan, and the ratepayers are in Michigan. The only aspect of the matter that is not Michigan-based is that the rates, terms and conditions of this transaction would have been determined in Washington by the Federal Energy Regulatory Commission. For 17 years all rates related to that plant were set by the state Commission. A change in ownership would not in any way change the physics of how the plant operates. Its operation hasn't harmed interstate commerce for the last 17 years. Where is the logic to justify a switch from state to federal jurisdiction simply on the basis of plant ownership? Yet, current law would cause that to occur.

6. Finally, the resolution covers the need to clarify and rationalize the roles of the SEC, FERC and state commissions on the subject of regulating the terms and conditions of wholesale contracts entered into by electric utilities that serve retail customers. How would NARUC divide up this jurisdiction in order to insure that the interests of consumers are represented?

The answer to this question is multi-faceted. Its complexity does not allow for an adequate answer in the space allowed here and, preferably should not be designed by state commissions without collaboration with the best minds at the FERC and SEC. In testimony and through both oral and written communications of various sorts, NARUC has been calling for a comprehensive reassessment of regulatory jurisdictional apportionment in light of the changes to the industry structure made possible by the Energy Policy Act. In spite of the best efforts of Congress thus far, there still exist regulatory voids and opportunities for forum-shopping to the detriment of ratepayers. One example of this is the ability of registered holding companies to avoid integrated resource planning by claiming that states are preempted by the SEC from requiring planning. Since the SEC itself has no authority to require planning, the ratepayers have the worst of both worlds: preemption without planning. To alleviate this problem, NARUC has supported legislation that would have created voluntary regional regulatory bodies to allow states with jurisdiction over these operating subsidiaries to engage in regional integrated resource planning.

7. Your testimony also points out the problem caused by Congress's failure in EPACT specifically to ratify the Pike County doctrine giving the states the power to review the lawfulness of wholesale power purchases by retail utilities. As electricity sold at wholesale now accounts for more than half of the electricity sold to the ultimate retail customer and continues to grow, do you think it is necessary for Congress to do more than we did in EPACT to ratify the fact that state commissions have this power?

Yes. The right of state commissions to determine whether individual utility decisions to purchase power are reasonable remains vulnerable to future court

challenges. To the extent that utilities elect to purchase rather than build power resources, this ability becomes the key tool that state commissions have to protect consumers. A clear and unequivocal statement from Congress affirming this right is even more essential than it was before the passage of the Energy Policy Act of 1992.

8. In response to a question from Rep. Hastert, you indicated that NARUC was seeking funding mechanisms such as dues from individual states in lieu of the revenue generated from the sale of cab cards to the motor carrier industry. Could you please briefly explain how the NARUC is funded?

To clarify my response to Mr. Hastert: The NARUC has always relied on assessments of individual state commissions to help fund its operations. These assessments have been increased to make up for the revenue lost due to the mandated phase-out of the cab card program, which was administered by the NARUC. This program, authorized by Public Law 89-170 (49 U.S.C. Sec. 11506 (1990), never had been funded by federal appropriations. Under this program, the NARUC certified to the Interstate Commerce Commission uniform standards and procedures by which the states implement a registration process for interstate motor carriers. Registration and certification of motor carriers was made through the use of forms sold by the NARUC directly to the motor carrier industry, as authorized by ICC regulations. Revenue generated from these forms partially funded the NARUC's operations. In addition, NARUC's annual meetings are funded entirely through registration fees charged registrants, with commissioners and their staff being charged and paying their own travel expenses as is the case with non-commission registrants.

If I can be of further assistance, please let me know.

Respectfully submitted,

Ronald E. Russell

Ronald E. Russell, Chair
NARUC Committee on Electricity

cc: Hon. Dennis Hastert
Ranking Member

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